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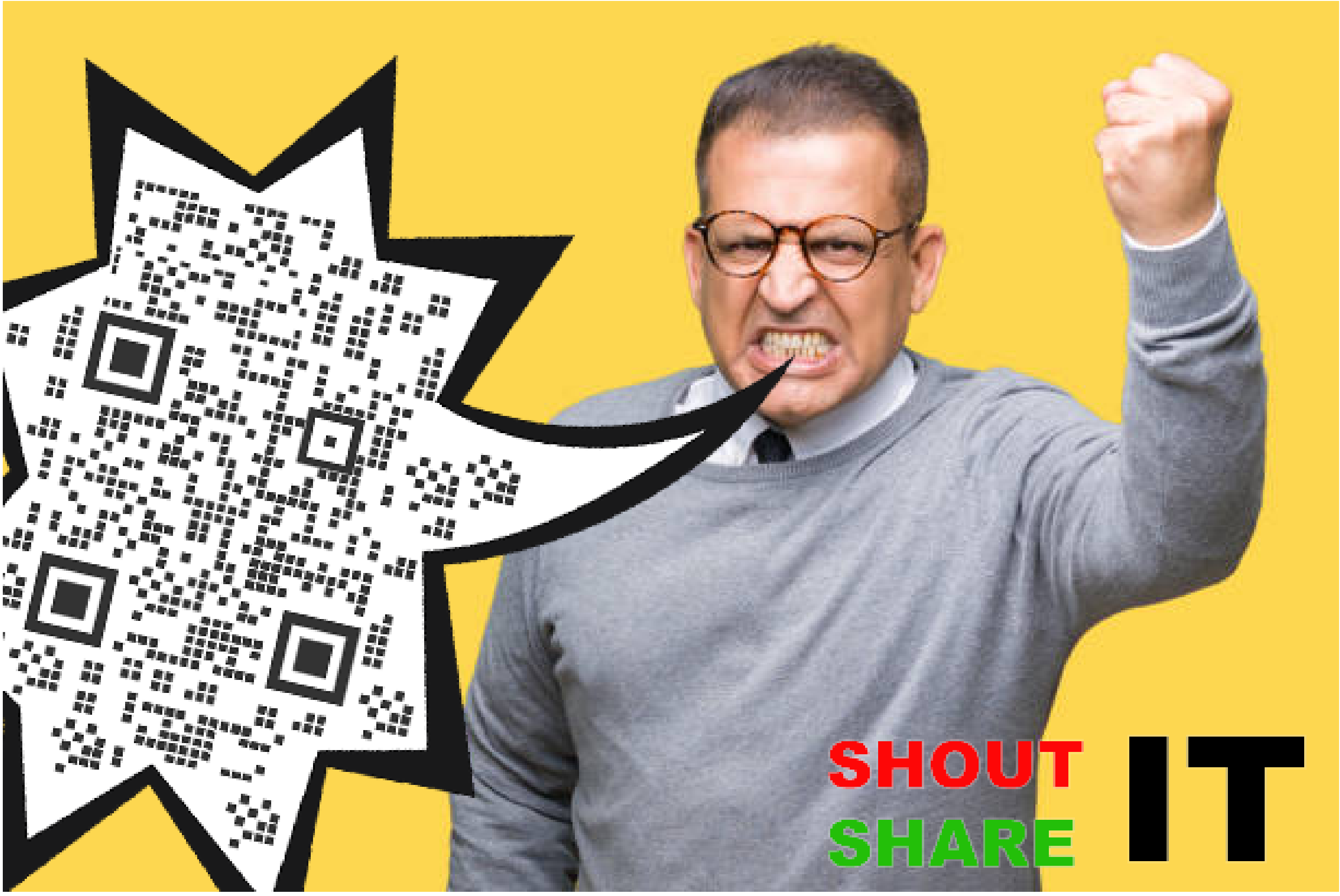
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UNITED STATES DEPARTMENT OF AGRICULTURE

DEPARTMENT BULLETIN No. 1106

Washington, D. C.

Issued October, 1922
Revised October, 1929

LEGAL PHASES OF COOPERATIVE ASSOCIATIONS

By

L. S. HULBERT
Principal Marketing Economist, Division of Cooperative Marketing
Bureau of Agricultural Economics

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LEGAL PHASES OF COOPERATIVE ASSOCIATIONS[1]

By L. S. Hulbert, *Principal Marketing Economist, Division of Cooperative Marketing, Bureau of Agricultural Economics*

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[1] This bulletin is an extensive revision of Department Bulletin No. 1106, U. S. Dept. Agr., 1922, "Legal Phases of Cooperative Associations," and has been brought up to date.

INTRODUCTION

Before taking up the strictly legal phases of cooperative organizations, something will be said concerning the character and characteristics of farmers' cooperative associations.

Agricultural cooperation is a method of doing business. An agricultural cooperative association is a business organization owned and controlled by member agricultural producers, usually incorporated, which operates for the mutual benefit of its members or stockholders as producers or patrons on a cost basis after allowing for the expenses of operation and maintenance and any other authorized deduction for expansion and necessary reserves. This definition is intended only as an approximation. It should not be assumed that it is unnecessary for a cooperative association to have money, although the amount of money necessary for a given association depends upon the character of its business and the scope of its plans. Working capital and adequate financial reserves are as essential for a cooperative association as they are for a commercial concern. In respect to cooperative associations, producers may be members, creditors, debtors, and patrons.

Cooperative associations in this country, formed for the marketing of farm products or for the purchase of farm supplies, or both, constitute one of the most important groups of farmers' organizations.[2] The purpose of this group of farmers' business organizations is to engage in business activities incident to the marketing of the products of its members or the acquisition of farm supplies for them. The foundation and framework of a farmers' cooperative association and all of its methods and plans are for the purpose of aiding those producers who have united or who may unite in the enterprise to conduct it along sound, successful business lines. That agricultural producers have the right to market their own products through their own agencies is obvious. Forms of organization vary, but there are a few well-recognized principles which distinguish the cooperative from the commercial organization.

The cooperative character of an association does not depend upon whether it is formed with or without capital stock. Either type of association may be thoroughly cooperative if properly organized and operated.

Substantial equality among the producers who are interested in a cooperative association, with respect to its affairs, is fundamental. The one-man, one-vote principle is generally accepted by cooperatives, but is not indispensable. Sometimes equality among members in the capital-stock form of cooperative association is furthered through limiting the number of shares which a producer may own. This is in contrast to the situation in commercial corporations in which, from a legal standpoint, a shareholder may own any available number of shares. Frequently, even in the case of capital-stock cooperatives, the shareholders are restricted to one vote each, regardless of the number of shares of stock owned. The dividend rate on the stock or membership capital of cooperative associations is restricted to a fair rate of interest. This again is in contrast with the situation in commercial corporations, in which the dividend rate is, from a legal standpoint, unlimited. The payment of a fair rate of interest by cooperatives on their stock or membership capital is an operating expense, like interest paid on borrowed money. It tends to produce equality among the shareholders or members because it eliminates the differences caused by the fact that some members utilize the association less than others or have contributed more than others to its establishment.

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[2] See the following publication: ELSWORTH, R. H. AGRICULTURAL COOPERATIVE ASSOCIATIONS, MARKETING AND PURCHASING, 1925. U. S. Dept. Agr. Tech. Bul. 40, 98 p., illus. 1928.

The persons with whom a commercial corporation deals are usually not members; but in a farmers' cooperative association the members are also patrons; that is, they deliver their products to the association for marketing or acquire supplies from or through it. With cooperative associations the advantages which accrue to members accrue primarily because they are patrons of the association. Patronage of, and not money invested in, the cooperative association determines the distribution of benefits. Obviously, the progress that may be made by a cooperative association and the results that may be achieved by it are directly and inevitably affected by the extent and the consistency of its members' patronage.

It is apparent that the relationship between the members of an association and the association is much more intimate and personal than is the case in the ordinary corporation. The courts have recognized that this is true.[3] In a nonlegal sense a cooperative partakes of the nature of a joint enterprise or partnership. Membership in a capital-stock cooperative association is had through the purchase of a share or shares of its stock and the meeting by the purchaser of any other authorized requirements of the association; membership in a nonstock cooperative association is had through application for membership and acceptance by the association and the meeting of any other authorized requirements. A common requirement for both stock and nonstock associations is the signing of a marketing contract.

It should not be assumed that the members or stockholders of a cooperative association, except in a technical legal sense, are separate and apart from the association. The members are the association, and the officers and directors of the association are simply their agents for the conduct of the joint enterprise. The officers and directors of an association are placed in office and continue there only through the action or acquiescence of the stockholders or members. In other words, the stockholders or members are the principal or the "employer," and the officers and directors are simply their "employees" or agents to direct the business; and agents are subject to the control of their employers.

Frequently, if not generally, cooperative associations on receiving the products of a member make an advance to him which constitutes merely a "part payment," or to speak more accurately, partial returns; final returns are made after the sale of the products or at the end of the pooling or marketing period. Pooling is a practice common to cooperative associations.[4] It is an averaging proposition. For instance, the expenses incident to the operation of an association are pooled and are then divided among the members on an equitable basis. Many cooperative marketing associations pool the products received from their members; that is, they mingle those products which are of the same grade and character so that the identity of any particular lot is lost. On the sale of the products in a particular pool, the association renders a final account to each member, based upon the quantity which he contributed to the pool. Some associations pool returns without pooling products—that is, the returns from products of the same grade and quality which are sold during a given period, usually at varying prices, are lumped together and are then divided among the members on a unit basis.

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[3] California Canning Peach Growers *v.* Downey, 76 Cal. App. 1, 243 P. 679.

[4] See the following publication: CHRISTENSEN, C. L. POOLING AS PRACTICED BY COOPERATIVE MARKETING ASSOCIATIONS. U. S. Dept. Agr. Misc. Pub. No. 14, 12 p. 1929.

Some associations, such as cooperative livestock commission concerns, act simply as agents for members in the sale of their products; other associations take title to the products received from their members, but otherwise function and account to members as though acting only as agent. Nearly all marketing associations enter into contracts with their members for specified periods, which require the members to deliver their products to the association for marketing. These contracts are usually comprehensive and state the undertakings of the association and the member with regard to the delivery and marketing of the products covered.

All the States but one[5] have statutes peculiarly adapted to the incorporation of cooperative marketing associations. These corporations, in many respects, function along lines similar to those followed by commercial corporations; that is, each of them has a board of directors, officers, and employees through whom the affairs of the association are conducted.

Informed and intelligent management is as necessary in the conduct of a successful cooperative association as it is in any other successful corporation. Management has been called the vital factor in the success of any cooperative association. "Cooperative marketing of farm products appears to be a necessity. Its success, however, depends upon the business sagacity and honesty of those in charge."[6]

INCORPORATED ASSOCIATIONS OR CORPORATIONS

NATURE AND CHARACTERISTICS

A point to be made clear at the outset is that an incorporated cooperative association, whether formed with or without capital stock, is a corporation just as much as an incorporated organization formed to manufacture automobiles, farm implements, or steel. It is true that incorporated cooperative associations are a particular type of corporation, just as incorporated commercial concerns or charitable organizations are of particular types. As nearly all farmers' cooperative associations are incorporated, and as it is highly desirable, as a rule, that they should be, the greater part of this bulletin will be devoted to a consideration of incorporated associations. Whenever the word "association" is used herein, unless otherwise specified, an incorporated association is meant.

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[5] Delaware.

[6] Dark Tobacco Growers' Co-op. Ass'n. *v.* Robertson, 84 Ind. App. 51, 150 N. E. 106, 113.

A discussion of some of the characteristics of corporations may be desirable at this point. These characteristics, it should be kept constantly in mind, belong to incorporated cooperative associations, stock and nonstock,[7] as well as to other corporations. The term " incorporation " is used with reference to corporations which do not have capital stock as well as with reference to those which have capital stock. It describes the act of creating a corporation. A corporation is an artificial entity created by the law; it is a creature of the law. The definition of a corporation which is probably more widely employed in this country than any other is that given by Chief Justice Marshall in the Dartmouth College case,[8] where he defines a corporation as " an artificial being, invisible, intangible, and existing only in contemplation of the law."

"A corporation is an artificial being, separate and distinct from its agents, officers, and stockholders." [9] Just as Smith and Jones are different persons, so a corporation is normally a legal entity distinct from its agents, officers, stockholders, or members.[10] Individuality, if the term may be employed, is the dominant distinguishing quality of a corporation. The stockholders or members of a corporation, as well as its officers and directors, may change constantly, but the existence of the corporation is not affected thereby. It lives on as unaffected by these changes as a man is unaffected by changes of clothing. As an engine is separate from the engineer who runs it, so a corporation is normally separate from its agents, officers, stockholders, or members.

The members do not have title to the property of a corporation.[11] They can not transfer the legal title thereto, although all of them join in the execution of papers purporting to transfer the property.[12] It can be done only through the proper officers or agents of the corporation. A corporation can act only through its officers or agents,[13] and these must have been authorized to act by the board of directors of the corporation. Normally, if one man acquires all the stock of a corporation, the title to the property of the corporation is not in him, and he can not sue in his own name for damages to the property, nor can he thus transfer title to it.[14] Nor can he, if not an attorney, it has been held, represent the corporation in court.[15] A stockholder as such is not an agent of the corporation.[16]

A stockholder or member of a corporation has no control over any part of the assets of the corporation prior to its liquidation. A stockholder or member of an association, on the other hand, is not because of this fact a creditor of the association, and the possession of a certificate of membership or of stock, whether common or preferred, is not evidence of indebtedness[17] but merely of ownership. Normally, if one corporation owns all the stock of another corporation, a subsidiary, the courts regard the two corporations as separate and distinct.[18] If the corporate form is being used as a cover or medium for effecting a fraud or working an injustice, the courts will disregard the separate entity of the corporation and will hold the persons interested therein liable or responsible.[19]

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[7] Meikle, receiver, North Pac. Fruit Distributors *v.* Wenatchee North Central Fruit Distributors, 129 Wash. 619, 225 P. 819; In re Mt. Sinai Hospital, 250 N. Y. 103, 164 N. E. 871.

[8] Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 514, 635.

[9] Lange *v.* Burke, 69 Ark. 85, 61 S. W. 165; Aiello *v.* Crampton, 201 F. 891; J. J. McCaskill Co. *v.* United States, 216 U. S. 504, 30 S. Ct. 386, 54 L. Ed. 590.

[10] Rutledge Co-op. Ass'n, Inc., *v.* Baughman, —— Md. ——, 138 A. 29.

[11] Rhode Island Hospital Trust Co. *v.* Doughton, 270 U. S. 69, 46 S. Ct. 256; Wabash Ry. Co. *v.* Amer. Refrigerator Transit Co., 7 F. (2d) 335.

[12] City of Winfield *v.* Wichita Natural Gas Co., 267 F. 47.

[13] Grosfield *v.* First Nat. Bank, 73 Mont. 219, 236 P. 250.

[14] Button *v.* Hoffman, 61 Wis. 20, 20 N. W. 667; City of Winfield *v.* Wichita Natural Gas Co., 267 F. 47.

[15] Cary & Co. *v.* F. E. Satterlee & Co., 166 Minn. 507, 208 N. W. 408.

[16] United States *v.* Strang et al., 254 U. S. 491.

The stockholders or members of a corporation, whether stock or nonstock, are not generally liable for its debts. In all jurisdictions, however, stockholders or members can be compelled to pay the amount which they have agreed to pay for stock of the corporation or for membership in it. The laws of some States, notably New York and New Jersey, permit the organization of cooperative associations with liability by the stockholders or members for debts of the corporation. In Minnesota the constitution imposes double liability on the stockholders of all corporations except those engaged solely in manufacturing.[20] A stockholder of a corporation, cooperative or otherwise, under the constitution of California is "individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time that he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association," and a provision in the code of that State imposes similar liability on the members of nonstock corporations or associations.

In every case the constitution and statutes of the State should be examined to determine the exact liability of stockholders or members in that State. The Supreme Court of the United States has held that an organization may be a corporation, although its stockholders are liable for its debts.[21] But, as a general rule, the stockholders of a corporation are not liable for its debts. From this fact results one of the great advantages of incorporation. It enables a man to venture a definite sum of money in a business without risk of losing more in case the business fails. Persons dealing with corporations are affected with notice of its charter and the statutes of the State regulating its powers and duties.[22]

Every corporation suggests cooperative effort on the part of those interested. Several of the large industrial corporations have each more than 100,000 stockholders. The cooperation in such organizations consists largely in the pooling of the money paid by stockholders for stock. If each of the original stockholders of one of these corporations had acted singly and independently in attempting to establish and increase the particular business involved, much less progress would probably have been made than has been accomplished through the corporation.

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[17] Sternbergh *v.* Brock, 225 Pa. 279, 74 A. 166, 24 L. R. A. (N. S.) 1078; Wineinger *v.* Farmers' & Stockmen's Loan & Investment Ass'n (Tex. Civ. App.), 278 S. W. 932.

[18] Cannon Manufacturing Co. *v.* Cudahy Packing Co., 267 U. S. 333, 45 S. Ct. 250; People *v.* American Bell Telephone Co., 117 N. Y. 241, 22 N. E. 1057.

[19] J. J. McCaskill Co. *v.* United States, 216 U. S. 504; First National Bank of Chicago *v.* F. C. Trebein, 59 Ohio St. 316, 52 N. E. 834; State Trust & Savings Bank *v.* Hermosa Land & Cattle Co., 30 N. M. 566, 240 P. 469; Home Fire Ins. Co. *v.* Barber, 67 Neb. 644 93 N. W. 1024, 60 L. R. A. 927.

[20] Lindeke *v.* Scott County Co-op. Co., 126 Minn. 464, 148 N. W. 459; in re Farmers' Dairy Co.'s Receivership, —— Minn. ——, 225 N. W. 22.

[21] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566.

[22] Sterling *v.* Trust Co. of Norfolk, —— Va. ——, 141 S. E. 856.

ANTIQUITY OF CORPORATIONS

The idea of a corporation is an old one. It is said to have been originated by the Romans, although there is not entire agreement among law writers on this point. Corporations were known to the Greeks and Romans centuries before the Christian era. Before the Norman conquest (1066) there existed in England organizations having many of the elements of corporations. Churches were among the first of these organizations. It was not until the middle of the seventeenth century that the large trading corporations of England came into existence. Chief among these was the Hudson Bay Co., which continued, it is said, until 1867.

POWER TO CREATE CORPORATIONS

The power of creating corporations resides in the sovereign. In England they were originally created by the king; later they were created by acts of Parliament with the express or implied assent of the king.[23]

In this country the power to create corporations belongs to each State and the Federal Government. A State legislature may create a corporation or provide for its creation for any proper purpose and may confer upon it such powers as it sees fit, subject only to such restrictions as are found in the State and Federal Constitutions.[24] Congress may create corporations whenever they are necessary or proper agencies for carrying into execution any of the powers conferred by the Constitution upon the Government of the United States.[25] Congress, because it has exclusive jurisdiction over the District of Columbia, has the same power to create corporations within the District that a State has to create corporations within its borders.[26]

Formerly all corporations in this country were created by special enactments; that is, a special act was passed by the legislature of the State every time a corporation was created. It was believed that this practice led to favoritism and unjust discrimination,[27] and gradually it has come to pass that practically all of the States now have provisions in their constitutions prohibiting, with certain exceptions in some States, the creation of corporations by special acts.

Every State now has general statutes which authorize and provide for the formation of corporations. The statutes of some States are broad and comprehensive and permit the formation under them of corporations to engage in practically every form of lawful activity. Sometimes the statutes permit only the incorporation of particular types of corporations, or of corporations to engage in certain lines of business. Even though a business is lawful, if provision is not made for the formation of corporations to engage in that business they can not be incorporated in that State.

Those who wish to form a corporation must meet the terms and conditions prescribed by the State. The power of the State in this matter is supreme.[28] The legislature can grant just as little or just as much power to corporations, within constitutional limits, as it desires.[29] A cooperative association was incorporated under a statute of Pennsylvania which, among other things, provided that all business of associations incorporated under it, except certain enumerated types, should be for cash, and that all persons who extended credit to such associations except for specified purposes should forfeit the amount of the credit thus extended. The statute required that notice to this effect be published on the letter and bill heads, advertisements, and other publications of associations incorporated thereunder. Debts for purposes not contemplated by the statute were incurred by an association, and the creditors sought to throw the association into bankruptcy, but failed, as the court held that they had no claims which could be recognized in bankruptcy, owing to the provision in the statute referred to.[30]

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[23] Blackstone's Commentaries, v. 1, Book 1, p. 472.

[24] New Orleans Gas Co. *v.* La. Light Co., 115 U. S. 650; Northern Securities Co. *v.* United States, 193 U. S. 197.

[25] McCulloch *v.* The State of Maryland, 4 Wheat. 316, 4 L. Ed. 314.

[26] City of Georgetown *v.* Alexandria Canal Co., 12 Pet. 91.

[27] Wells, Fargo & Co. *v.* Northern Pac. Ry. Co., 23 F. 469.

In a California case, the validity of a statute providing for the forfeiture of the charters of all corporations which failed to pay a certain tax by a specified date was upheld.[31] A State can determine upon what conditions corporations formed in other States may do an intrastate business within its borders.[32] A corporation engaged in interstate commerce may enter any State for all the legitimate purposes of such commerce without the leave or license of the State.[33]

At one time the various States did not have statutes which were peculiarly adapted to the formation of cooperative associations but many statutes have been passed by the legislatures of the different States during the last few years for the purpose of providing for the formation of cooperative associations. When this bulletin went to press, all but one of the States (Delaware) had statutes especially designed to authorize the creation of such bodies.[34]

The right of States to enact statutes providing for the formation by farmers of cooperative associations and containing no authority for those engaged in other occupations to organize under them appears to be established. The Supreme Court of the United States has said: "Undoubtedly the State had power to authorize formation of corporations by farmers for the purpose of dealing in their own products."[35] Although corporations are now, as a rule, formed under general statutes, the act involved in bringing them into existence is regarded as a legislative one, and the rules relative to statutes are applied by the courts in construing charters.[36]

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[28] City Properties Co. *v.* Jordan, 163 Cal. 587, 126 P. 351.

[29] Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kan. 672, 216 P. 311; Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937.

[30] In re Wyoming Valley Co-op. Ass'n, 198 F. 436; Sterling *v.* Trust Co. of Norfolk, —— Va. ——, 141 S. E. 856.

[31] Kaiser Land & Fruit Co. *v.* Curry, 155 Cal. 638, 103 P. 341.

[32] Burley Tobacco Growers' Co-op. Ass'n *v.* Rogers, —— Ind. App. ——, 150 N. E. 384.

[33] Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282; Nebraska Wheat Growers' Ass'n *v.* Norquest, 113 Neb. 731, 204 N. W. 798; Dark Tobacco Growers' Co-op. Ass'n *v.* Robertson, 84 Ind. App. 51, 150 N. E. 106.

[34] Copies of the statutes of a particular State on this subject can be obtained usually by writing to the secretary of state of that State.

[35] Liberty Warehouse Co. *v.* Burley Tobacco Growers' Co-op. Marketing Ass'n, 276 U. S. 71, 48 S. Ct. 291.

[36] Casper *v.* Kalt-Zimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754; Lord *v.* Equitable Life Assurance Soc. of United States, 194 N. Y. 212, 28 N. E. 443, 22 L. R. A. (N. S.) 420.

FORMATION OF INCORPORATED ASSOCIATIONS

There is no Federal statute for the incorporation of cooperative associations. All States have statutes adapted to the incorporation of cooperative associations. To incorporate such an association it must be done under an appropriate State statute.

When incorporating a cooperative association, or any other corporation, it is necessary to ascertain and follow the requirements of the statute under which it is proposed to incorporate. Such statutes generally require that a certain number of individuals, usually three or more, must unite in articles of association. The term, articles of association, describes the paper or instrument in which those desirous of forming a corporation set forth the various facts required by the law under which they propose to corporate. Those whose names appear in the articles of association, or, as they are sometimes called, articles of incorporation, are known as the incorporators.

The statutes require that the objects and purposes for which the corporation or association is formed shall be clearly stated in the articles of association or incorporation; that the name by which the cooperative association or incorporation is to be known shall be given; and that the amount of capital stock, if the association is to have capital stock, shall be stated. Some of the other usual statutory requirements are the length of time for which the association is to exist, and its principal place of business. The principal place of business specified in the articles of incorporation need not be the place where the major part of the business of an association is transacted.[37] It merely fixes the legal residence of the association. Every provision included in the articles of incorporation of an association must be authorized by the law under which the association is formed; and if an unauthorized provision is included it is void.[38]

Application to be incorporated or for a charter is commonly made to an officer of the State, usually the secretary of state. The articles of association or incorporation or the certificate of incorporation, as it is called in some States, which constitute such application is submitted to this officer and, if he finds that the statute under which the incorporators are seeking to incorporate has been complied with and that the purpose of the association is one provided for in the statute he approves the same.

The statutory requirements for incorporation should be strictly followed, and care should be taken to see that the State officials concerned with the formation of corporations function properly. In an Iowa case,[39] it was held that a cooperative association was not incorporated, although an attempt to incorporate had been made, because of defects in the filing, acceptance, and verifying of the articles of incorporation by the secretary of state of Iowa; and hence a creditor of the association recovered from the stockholders as partners.

The amount of discretion which the secretary of state, or like officer, has with respect to the acceptance or rejection of an application for a charter is not the same in all States.[40] Upon the approval by the secretary of state of the application for a charter, the corporation, in most States, comes into existence. The procedure in the different States is not uniform, but this discussion may give a general idea of the steps involved. In Georgia and in some other States, application for a charter must be made to a court. Some States require that the charter or the articles of association, or both, must be recorded in the county where the association is to have its principal place of business. In certain States, it is necessary to advertise for a given length of time that an application for a charter is being made. The exact moment when a corporation comes into existence varies in the different States and depends upon their statutes. It is believed that all States require the payment of certain fees as an incident to incorporation.

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[37] Dairymen's League Co-op. Ass'n, Inc., *v.* Brundo, 227 N. Y. S. 203.

[38] People *v.* California Protective Corporation, 76 Cal. App. 354, 244 P. 1089.

[39] Wilkin Grain Co. *v.* Monroe County Co-op. Ass'n, —— Iowa ——, 223 N. W. 899.

It is highly important that due consideration should be given by those interested in forming a cooperative association, prior to its incorporation, to the matter of determining the particular statute under which to incorporate.

Many of the cooperative marketing acts[41] urge those contemplating the formation of an association to communicate with the College of Agriculture of the State or some other State agency concerned with agriculture for advice as to what " a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success." Advice concerning such matters may be obtained also from the Division of Cooperative Marketing of the Federal Farm Board.

Other important matters to be considered at the time of forming an association are the conditions of the Capper-Volstead Act, the particular provisions to be included in the articles of association, the matter of finances, and of income taxes. To avoid the necessity of amending the charter at a later date, steps should be taken to see that the powers acquired by the association on incorporation are sufficiently broad to permit the association to engage in any activity which may be found advisable. Those interested in associations to be formed with capital stock should investigate the " blue sky " laws of the State or States in which stock will be sold and govern their actions accordingly.[42]

Those interested in forming associations of producers to act as livestock commission agencies should have certain portions of the packers and stockyards act, 1921,[43] in mind, and particularly section 306 thereof, which prohibits the payment of patronage dividends to nonmembers. The foregoing makes it plain that those desirous of forming an association should have competent advice with respect to the legal aspects of incorporation as well as the conduct of the association's business.

NAME OF ASSOCIATION

It is absolutely essential that a corporation have a name under which it shall transact its business. This is necessary for purposes of identification. Fundamentally the incorporators of a corporation may select any name they choose for the corporation that is not an imitation of a name already used by a corporation engaged in the same line of business that the new corporation will be engaged in. Statutory provisions in reference to this subject now exist in many States. These provisions frequently require that the name shall clearly indicate that the corporation is incorporated. Sometimes the statutes require that the name shall include the word "corporation," "incorporated," or the abbreviation "Inc." Restrictions prohibiting the adoption of a name already used or so similar thereto as to be easily mistaken therefor exist in many States.

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[40] Lloyd *v.* Ramsay, 192 Iowa 103, 183 N. W. 333.

[41] See sec. 5 of Bingham Cooperative Marketing Act of Kentucky on p. 119 of the appendix.

[42] Cannon *v.* Farmers' Union Grain Agency, 103 Or. 26, 202 P. 725; Kirk *v.* Farmers' Union Grain Agency, 103 Or. 43, 202 P. 731.

[43] 42 Stat. 159.

Independent of statute, for one corporation to imitate the name of another corporation may, depending on the circumstances, constitute unfair competition, and if such is the case the courts will enjoin the corporation that is guilty of such imitation. In an Oregon case[44] it was said, "In any case, to entitle the complaining corporation to an injunction, the name used by defendant, when not the same as that of plaintiff, must be so similar thereto that, under all the circumstances of locality, business, etc., its use is in itself reasonably calculated to deceive the public and result in injury to plaintiff, or else it must be used fraudulently in such a way as to have that effect." The court further said: "Injunction will be refused where no probability of deception by reason of the name is shown. Priority in adoption and use usually confers the superior right."

The statutes of a number of States prohibit the use of the word "cooperative" in the name of a corporation unless the corporation is in fact a cooperative one or unless it is organized under a certain statute.

The term "association" standing alone at common law and in the absence of a statute does not have a definite legal meaning. It suggests an organization, but whether the organization is incorporated or unincorporated is unknown. Probably to many it suggests a corporation, and many of the statutes providing for the incorporation of a cooperative association state that the term means a corporation. But in the absence of a statute making it so the term is not synonymous with corporation. The words "exchange," "union," and "company" likewise do not have an exact meaning, but to many they undoubtedly mean the same as the word "corporation," and in a number of the States statutes for the incorporation of cooperative associations provide that they are synonymous with the word "corporation."

CHARTER

In the days when corporations were formed through applying to the king, the paper or instrument which was issued by him, if he acted favorably on the application, was called the charter. It was evidence that a corporation had been formed, and it stated the objects, powers, and limitations. Again, when corporations were created by special acts of the legislature,[45] the act setting forth similar facts was called the charter. At this time when corporations are created under general statutes, the paper (whether called articles of association or articles of incorporation or certificate of incorporation) that is signed by those desirous of being incorporated, the incorporators, is commonly looked upon as the charter after its acceptance and approval by the official of the State to whom application for incorporation is made.

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[44] Umpqua Broccoli Exch. *v.* Um-Qua Valley Broccoli Growers, —— Or. ——, 245 P. 324. See also Terry *v.* Cooper, 171 Ark. 722, 286 S. W. 806; Drugs Consolidated, Inc., *v.* Drug Incorporated, —— Del. Ch. ——, 144 A. 656.

[45] It is interesting to note that the Eastern Shore Produce Exchange, a cooperative organization of Onley, Va., was created by a special act of the general assembly of that State.

The charter is really much more than the articles of incorporation. It "consists of the provisions of the existing State constitution, the particular statute under which it is formed and all other general laws which are made applicable to corporations formed thereunder, and of the articles of association or incorporation filed thereunder, or the charter or certificate of incorporation granted by the court or officer in compliance with its terms; and its powers, rights, duties and liabilities are determined accordingly."[46] The foregoing definition makes it clear that the rights, powers, and liabilities of a corporation can not be determined merely by reference to the articles of association and that the charter is something more than a paper.

An association should confine its operations to those activities that are authorized by its charter. If an association, for instance, is incorporated to handle one kind of tobacco, it is without authority to handle another kind.[47] If an association under the statute under which it is formed may do business only with members, it is without authority to do business with nonmembers.[48] If an association engages in a business or activity not authorized by its charter, any member of the association who does not consent thereto can obtain an injunction restraining the directors and officers from such course of action.[49] In addition, the State can prevent the doing of the unauthorized business and in a proper case can revoke the charter of the association on account thereof.[50]

It is believed that all of the States have provisions in their statutes or constitutions relative to the revocation of charters of corporations. Independent of such provisions, it is generally held that if an association or other corporation violates the laws of the State in the conduct of its affairs, the State that granted the charter may revoke it.[51] Those receiving the charter receive it on the implied condition that it will be used for lawful purposes only. It is apparent that a State would never create a corporation to violate its laws; hence revocation of a charter for the violation of such laws appears reasonable.

BY-LAWS

The adoption of by-laws is a matter which is taken up after the creation of an association. The power of a corporation to make by-laws exists at common law. Frequently, however, it is given by the charter or statutes. The statutes of some of the States require that cooperative associations shall adopt by-laws within a certain length of time after their formation. In the absence of a statutory requirement it is not necessary, although highly desirable, for an association to adopt by-laws. The power to adopt by-laws resides in the stockholders or members, and they alone have the power to adopt them in the absence of a provision in the general law or in the charter, placing it in the hands of a select body.

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[46] 14 C. J. 117.

[47] Brame et al. *v.* Dark Tobacco Growers' Co-op. Ass'n, 212 Ky. 185, 278 S. W. 597.

[48] American Live Stock Commission Co. *v.* United States, 28 F. (2d) 63, —— U. S. ——, 49 S. Ct. 425.

[49] Arkansas Cotton Growers' Co-op. Ass'n *v.* Brown, 168 Ark. 504, 270 S. W. 946, 1119.

[50] People ex rel. Clark *v.* Milk Producers' Association of Central California, Inc., 60 Cal. App. 439, 212 P. 957.

[51] Hadley, State ex. inf. *v.* Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; State *v.* Thistle Down Jockey Club, 114 Ohio St. 582, 151 N. E. 709.

If the statute under which an association is incorporated authorizes the making of by-laws on specific subjects, barring constitutional questions, the association may adopt by-laws covering those subjects, but even where the power to adopt by-laws is thus expressly conferred the by-laws should be reasonable and fair. Statutory requirements and limitations should be compiled with, and by-laws in conflict with them fail.[52] A by-law is void if it contravenes limitations in the State or Federal constitution.[53] A by-law that is valid when made may be rendered invalid by a statute subsequently adopted.[54]

The purpose of by-laws is to provide rules for the regulation of the affairs of the corporation. They can make provision consistent with law and with the charter for any matter or thing relative to the conduct or business of the corporation. For instance, independent of statute, it has been held that by-laws may provide for liquidated damages,[55] a subject that will be discussed later. By-laws should perform the same office for a corporation or association that a blue print performs for a builder. They should constitute a working plan for the corporation. Among the matters usually provided for in the by-laws of a corporation are the following: The time, place, and manner of calling and conducting its meetings and the giving of notice thereof, the number of members constituting a quorum, the qualifications and duties of directors and officers and their compensation, if any, and suitable penalties for violation of the by-laws. A by-law must be general in its application and not aim at a particular member.[56]

By-laws are to be distinguished from rules adopted for the guidance of the public dealing with the association. The members of a corporation and its directors and officers are usually conclusively presumed to have notice of by-laws, and of what they contain, and hence are bound by them, although, as a fact, they may be ignorant of them.[57]

The great importance of members, officers, and directors knowing the provisions of the by-laws of their association is thus apparent. On the other hand, strangers having no knowledge of by-laws are not bound by them unless perhaps where specifically authorized by statute.[58]

If notice of by-laws, either actual or constructive, reaches strangers they are usually held to be binding on them.[59]

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[52] Oklahoma Cotton Growers Ass'n *v.* Salyer, 114 Okla. 77, 243 P. 232; Noble *v.* California Prune & Apricot Growers' Ass'n, —— Cal. App. ——, 276 P. 636.

[53] Spayd *v.* Ringing Rock Lodge No. 665, 270 Pa. 67, 113 A. 70, 14 A. L. R. 1443.

[54] Grisim *v.* South St. Paul Live Stock Exchange, 152 Minn. 271, 188 N. W. 729.

[55] Ex Parte Baldwin County Producers' Corporation, 203 Ala. 345, 83 So. 69.

[56] Budd *v.* Multnomah St. Ry. Co., 15 Or. 413, 15 P. 659.

[57] Washington Co-op. Egg & Poultry Ass'n *v.* Taylor, 122 Wash. 466, 210 P. 806; Brent *v.* Bank of Washington, 10 Pet. 594; Columbia Bldg. & Loan Ass'n *v.* Junquist, 111 F. 645.

[58] McKinney *v.* Mechanics' Trust & Savings Bank, 222 Ky. 264, 300 S. W. 631.

[59] Harley *v.* Hartford Fruit Growers' & Farmers' Exchange, 216 Mich. 146, 184 N. W. 507; Rathbun *v.* Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Iowa-Missouri Grain Co. *v.* Powers, 198 Iowa 208, 196 N. W. 979, 33 A. L. R. 1268.

A question which will readily occur to anyone is whether the majority of the members of an association may adopt by-laws which will be binding upon the minority who oppose their adoption.[60] The answer is "Yes," if such by-laws are reasonable and consistent with the charter and the general law. Herein lies an important difference between by-laws and contracts. A valid by-law is binding upon a member or stockholder although he opposed its adoption, but assent is necessary to the creation of a contract. A majority of the members can not adopt and enforce by-laws which violate the law or run counter to the purpose for which the association was formed.

In an Arkansas case, a majority of the members of a corporation sought through a by-law to make what, under the circumstances, was held to be an attempted gift of a sum of money to one of their members. Certain stockholders of the corporation opposed the by-law and later resorted to the courts to prevent the turning over of the money. It was held that the action contemplated was a distinct violation of their rights and was therefore, illegal.[61]

The fact that a person at the time he becomes a member of an association agrees to be bound by all present and future by-laws does not permit the association to adopt by-laws which will deprive him of vested rights under the by-laws which were in effect when he became a member.[62] For instance, if an association at the time a person acquires stock therein agrees that it will refund the purchase price if he leaves the community and it has a by-law to this effect, the fact that the shareholder agrees to be bound by all present and future by-laws does not permit the association to adopt a by-law abrogating the arrangement as to him.[63]

If a member voted in favor of repealing a by-law or of adopting one that adversely affected his interests under by-laws in effect when he became a member, he would be estopped to challenge its validity.[64] If a statute[65] or by-law[66] provides for action by the board of directors the same action taken by the manager will not be binding on the association. A by-law of an association purporting to impose personal liability on members for its debts has been held void if the charter of the association or the statute under which it was formed did not authorize such a by-law.[67] All authorities agree that under no circumstances can an unauthorized "by-law" impose any liability on members who did not vote therefor or acquiesce therein.[68]

If a by-law provides for the automatic termination of membership upon failure or neglect to deliver products, a member can not, by refusing to deliver, terminate his membership unless the association consents thereto.[69] Such a by-law is for the association's benefit; furthermore, the maxim that no man may take advantage of his own wrong would seem to apply.

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[60] Iowa State & Savings Bank *v.* City Nat. Bank, 106 Neb. 397, 183 N. W. 982.

[61] G. W. Jones Lumber Co. *v.* Wisarkana Lumber Co., 125 Ark. 65, 187 S. W. 1068.

[62] Farrier *v.* Ritzville Warehouse Co., 116 Wash. 522, 199 P. 984; Jaeger *v.* Grand Lodge, Order of Hermann's Sons, 149 Wis. 354, 135 N. W. 869, 39 L. R. A. (N. S.) 494.

[63] Whitney *v.* Farmers' Co-op. Grain Co., 110 Neb. 157, 193 N. W. 103.

[64] Farrier *v.* Ritzville Warehouse Co., 116 Wash. 522, 199 P. 984; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159.

[65] Scott *v.* Marin, 22 F. (2d) 779.

[66] Farmers' Co-op. Mercantile Co. *v.* Shultz, 113 Neb. 801, 205 N. W. 288.

[67] Mitcham et al. [Warm Spring Truck Growers' Association] *v.* Citizens' Bank of Bullochville, 34 Ga. App. 707, 131 S. E. 181, 136 S. E. 798.

[68] 10 Cyc. 357; supra.

[69] California Bean Growers' Ass'n *v.* Rindge Land & Nav. Co., 199 Cal. 168, 248 P. 658.

Propositions embodied in valid by-laws are as binding on the members of an association as if included in the marketing contract. An egg association, acting in accordance with a by-law, allowed members to sell their eggs outside the association under specified conditions and, in a suit on its marketing contract by the association against a member who failed to comply with such conditions, the court held that the by-law was valid and virtually a part of the contract.[70]

Statutory provisions with respect to by-laws should be observed. In Oklahoma it has been held that if the statute under which an association is formed authorizes it to adopt a by-law requiring members to sell all of their products through the association and also one providing for liquidated damages upon condition that a by-law is adopted giving members an opportunity to withdraw, failure to adopt such a by-law voids by-laws adopted on the other two subjects and renders the marketing contracts of the association unenforceable.[71] It has been held that failure to adopt by-laws within the time provided by statute may not be used as a defense to a suit brought by an association against a member on his contract.[72]

The Supreme Court of Kansas held that a by-law reading " At any meeting a majority present in person or represented by proxy shall constitute a quorum for all purposes, including the election of directors, except when otherwise provided by law " meant that a majority of all the members of an association must be present in person or be represented by proxy at meetings of the association to authorize it to transact business.[73]

As indicating the possible scope of by-laws, a Nebraska case is interesting. It was held that a corporation not organized for profit and whose capital stock was fully paid up could lawfully require annual dues from its members.[74]

An invalid by-law, as such, creates no liability, but if not opposed to public policy is generally enforced as a contract between the members and between the corporation and its members. For instance, if the members of an association adopt what purports to be a by-law, but which is void for the reason that the corporation or association is not empowered by the law of the State in which it is incorporated or by its charter to adopt the particular by-law, it will, as a general rule, be enforced as a contract among those members who voted therefor or consented thereto.[75]

The term " constitution " is frequently used in connection with by-laws. So far as an incorporated association is concerned, the expression has no place. Incorporated associations have articles of incorporation (charters) but do not have constitutions. The use of the term with respect to incorporated associations only creates confusion. A " constitution " has been held to be only a by-law with an inappropriate name.[76]

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[70] Washington Co-op. Egg & Poultry Ass'n *v.* Taylor, 122 Wash. 466, 210 P. 806.

[71] Oklahoma Cotton Growers' Ass'n *v.* Salyer, 114 Okl. 77, 243 P. 232; McLain *v.* Oklahoma Cotton Growers' Ass'n, 125 Okl. 264, 258 P. 269.

[72] Tennessee Cotton Growers' Ass'n *v.* Hanson, 2 Tenn. App. 118.

[73] Everts et al. *v.* Kansas Wheat Growers' Ass'n et al., 119 Kan. 276, 237 P. 1030.

[74] Omaha Law Library Ass'n *v.* Connell, 55 Neb. 396, 75 N. W. 837.

[75] Strong *v.* Minneapolis Automobile Trade Ass'n, 151 Minn. 406, 186 N. W. 800; New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271.

[76] Supreme Lodge K. of P. *v.* Kutscher, 179 Ill. 340, 53 N. E. 620.

LIABILITY OF ASSOCIATION FOR PROMOTION EXPENSES

What is the liability of a corporation on contracts made or obligations incurred by its promoters or those who are active in forming and organizing it? The answer is that, as a general rule, it is not liable unless it recognizes and ratifies the contracts or obligations after its formation. This question arises in connection with the work done or contracts made incident to the promotion of a corporation and prior thereto by those who are active in bringing about the existence of the corporation.

In a North Dakota case,[77] in which the claim involved arose out of work done by a stock subscription solicitor in obtaining subscribers to the capital stock of a corporation to be organized, it was said:

> It is elementary that a corporation is not liable upon contracts entered into by its promoters. Before the corporation comes into existence, it can have no representative and no one is capable of acting for it. Those interested in promoting it may nevertheless contemplate the ultimate payment by the corporation of the legitimate promotion expenses. But the corporation does not become liable for such expenses in the absence of a subsequent undertaking in some form.

In a Montana case [78] appears the following:

> In the absence of a statute, a corporation will be held liable for services rendered by its promoters before incorporation, only when by express action taken after it becomes a legal entity it recognizes or affirms such claim; and a mere silence of the board of directors, or failure to object when the claim is mentioned, is not such an assumption or adoption as will bind the corporation.

It is true that, as a rule, a corporation usually pays the necessary legitimate expenses and costs incurred by those who brought about its formation, but the corporation is not liable for such charges unless it elects to pay them.[79]

LIMITATION ON INDEBTEDNESS

The common law places no limit upon the amount which a corporation may borrow. The amount borrowed may be greater than the capital stock.[80] The general rule is that a debt contracted by a corporation in excess of the limit fixed by statute or by the charter is valid and enforceable against the corporation. A national bank purchased furniture and executed three promissory notes in payment thereof at a time when the amount of its indebtedness exceeded that allowed by a Federal statute. In a suit brought on the notes it was held that the notes were enforceable against the bank. In this case, it was said, "We hold, therefore, that an indebtedness which a national bank incurs in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void from the fact that the amount of the debt surpasses the limit prescribed by the statute, or is even incurred in violation of the positive prohibition of the law in that regard." [81] In an Iowa case [82] it was said, "A corporate debt contracted in excess of the maximum limitation in its articles of incorporation is not void because of such excess." In the case of a corporation there are no public records by which one about to extend credit to it can ascertain the amount of indebtedness already incurred at the time credit is extended, and this furnishes a sufficient reason for holding a corporation liable in cases like those just discussed.

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[77] Davis *v.* Joerke, 47 N. D. 39, 181 N. W. 68.

[78] Kirkup *v.* Anaconda Amusement Co., 59 Mont. 469, 197 P. 1005; Cushion Heel Shoe Co. *v.* Hartt, 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. (N. S.) 979.

[79] Kridelbaugh *v.* Aldrehn Theatres Co., 195 Iowa 147, 191 N. W. 803.

[80] Cook on Corporations, 8th Ed., sec. 760.

[81] Weber *v.* Spokane Nat. Bank, 64 F. 208; see also H. Scherer & Co. *v.* Everest, 168 F. 822; Grand Valley Water Users' Association *v.* Zumbrunn, 272 F. 943.

[82] Junkin v. Plain Dealer Pub. Co., 181 Iowa 1203, 165 N. W. 339.

As pointed out elsewhere, officers and directors are liable to the corporation for all damages suffered by it where they exceed the limit of indebtedness fixed by the statute, charter, or by-laws. And directors and officers are made personally liable by statute in some States to third persons for debts in excess of the statutory amount.

In a Nebraska case involving a cooperative association the directors executed their accommodation notes therefor in an amount greatly in excess of the indebtednesss which the association was authorized to incur under its charter. Ultimately suit was brought against the association, and it was claimed that no recovery could be had because the amount of indebtedness exceeded that allowed by the charter. The court held, however, that the association was liable because the money had been used in the business for the benefit of the association and had not been returned, the court saying, "The right of recovery depends upon the receipt and retention of benefits under or by virtue of the ultra vires contract." [83] An association may be estopped from denying liability for debts created in excess of the amount fixed in its charter.[84]

LIEN ON STOCK

If a statute under which a corporation is incorporated or the general law of the State gives a corporation a lien on the stock of a stockholder for debts due the corporation by him, strangers, even though without actual notice, and residents of other States, buy the stock subject to the lien. The Supreme Court of the United States has said:[85] "When, by general law, a lien is given to a corporation upon the stock of a stockholder in the corporation for any indebtedness owing by him to it, that lien is valid and enforceable against all the world * * *." If the statute under which an association or corporation is to be incorporated authorizes the inclusion of a provision in the articles of association or the certificate of incorporation giving the corporation a lien on its stock for any indebtedness due it by a stockholder, such a provision, if included, is also valid against all the world.[86]

In a New York case the articles of association provided that "No shareholder of the association shall be permitted to transfer his shares or receive a dividend or interest thereon, who shall owe to the association a debt which shall have become due, until such debt be paid, unless by and with the consent of the board of directors of the association." On the face of each certificate of stock involved was the statement, "Subject to the conditions and stipulations contained in the articles of association." Although the plaintiff had no actual knowledge of the limitation on the transfer of stock, he was held bound by the provision in the articles of association.[87]

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[83] Simmons *v.* Farmers' Union Co-op. Ass'n of Bradshaw, 114 Neb. 463, 208 N. W. 144.

[84] New York Canning Crops Co-op. Ass'n, Inc., *v.* Slocum et al., 212 N. Y. S. 534.

[85] Hammond *v.* Hastings, 134 U. S. 401.

[86] Union Bank of Georgetown *v.* Laird, 2 Wheat. 390, 4 L. Ed. 387.

At least in some States if the purchaser or assignee of stock has actual or constructive notice of a by-law giving the corporation a lien on the stock, it is effective, and the corporation is not obliged to recognize the purchaser or assignee of the stock unless the lien is given effect.[88]

SUBSCRIBER, STOCK, CAPITAL STOCK

"A subscriber is one who has agreed to take stock from the corporation on the original issue of such stock." [89] The shares of stock into which the capital stock of the corporation is divided may consist of common stock or common and preferred stock. In Cook on Corporations it is said:

> By *common stock* is meant that stock which entitles the owners of it to an equal pro rata division of profits, if any there be; one stockholder or class of stockholders having no advantage, priority, or preference over any other stockholder or class of stockholders in the division. By *preferred stock* is meant stock which entitles its owners to dividends out of the net profits before or in preference to the holders of the common stock. Common stock entitles the owner to pro rata dividends equally with all other holders of the stock except preferred stockholders; while preferred stock entitles the owner to a priority in dividends.

Usually the dividend rate on preferred stock is fixed, whereas that on common stock in commercial corporations is not generally fixed.

Under the statutes of many of the States the right to vote at meetings of the stockholders is limited to the common-stock holders, and many of the statutes providing for the incorporation of cooperative associations authorize by-laws that limit the right to vote to common-stock holders of the corporation.

"The capital stock is usually divided into equal portions called shares; and a share of the capital stock of a corporation is the interest or right which the owner has in the management of the corporation, in its surplus profits, and upon dissolution in all its assets remaining after the payment of its debts." [90]

Shares of stock are usually represented by certificates of stock. A certificate of stock is not the stock itself but simply evidence of its ownership, just as a deed is evidence of the ownership of land. A stockholder or shareholder is one who owns one or more shares of stock. One may be a stockholder, although no certificate of stock has been issued to him,[91] just as one may be the owner of other personal property, although he has never received a bill of sale thereto.

A stockholder is not by reason of this fact a creditor of an association, and the possession of a certificate of stock, whether common or preferred, does not represent indebtedness but ownership.[92]

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[87] Gibbs *v.* Long Island Bank, 83 Hun, 92, 31 N. Y. S. 406.

[88] Iowa-Missouri Grain Co. *v.* Powers, 198 Iowa 208, 196 N. W. 979, 33 A. L. R. 1268.

[89] Cook on Corporations, 8th Ed., v. 1, p. 43.

[90] 14 C. J. 384.

[91] In re Culver's Estate, 145 Iowa 1, 123 N. W. 743.

[92] Sternbergh *v.* Brock, 225 Pa. 279, 74 A. 166, 24 L. R. A. (N. S.) 1078; Wineinger *v.* Farmers' & Stockmen's Loan & Investment Ass'n (Tex. Civ. App.), 278 S. W. 932, 287 S. W. 1091.

HOW STOCK IS PAID FOR

Stock, as a rule, may be paid for with cash, other property, or labor. In most States there are statutory provisions relative to paying for stock otherwise than with cash, and these should be ascertained and carefully followed. In the absence of charter or statutory provisions, stock may be issued in payment for property, but the property should be reasonably worth the par value of the stock paid for it. It is the general rule that in order for a payment for stock to be good as against the corporation or creditors thereof, it must be paid for in money or what may fairly be considered the equivalent of the money value.[93]

STOCK AND NONSTOCK ASSOCIATIONS

A stock corporation is a corporation that has capital stock. As evidence of these shares certificates of stock are usually issued. The owners of these certificates of stock, by acquiring them, become its shareholders or stockholders, and thus become the "owners" of the corporation.

Capital stock and stock certificates or stock are generally regarded as characteristics of a business corporation. That is, business corporations usually have capital stock and usually issue certificates of stock. This need not necessarily be true. For it should be remembered that corporations are creations of the legislature and that it can, within constitutional limitations, endow them with such powers and limitations as seem advisable. The State, then, can create business corporations without the elements mentioned. True, this is not generally done, but the power to do so undoubtedly exists. It must be borne in mind that the legislature has complete control, within constitutional limitations, of the creation of corporations. It may make no provision for their creation, or it may grant to those created closely limited or very wide powers.

Nonstock corporations do not have capital stock and usually are not commercial organizations. They usually issue certificates of membership to their members evidencing the right of the members in the corporation. Some of the more common of the corporations of this type are incorporated churches, clubs, or social organizations. In the early history of business corporations having capital stock, certificates of stock evidencing the shares into which the capital stock of the corporation had been divided were not issued, but as time went on some corporations issued certificates of stock evidencing the interest of shareholders in the corporation. The convenience and desirability of stock certificates which could be readily transferred from hand to hand were so apparent that it soon came to be looked upon as a right of a member of a business corporation to have certificates of stock issued to him. And at the present time purchasers of stock may generally require the corporation to issue certificates of stock.

From an early date stock certificates were assigned and transferred, and this assignability is generally regarded as one of their leading qualities. Generally speaking, the policy of the law is against restraint on the disposition or sale of property. However, the courts have upheld restrictions on the right of members to transfer shares of stock. At common law, shares of stock are regarded as personal property capable of sale, transfer, or succession in any of the ways by which personal property may be transferred.[94]

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[93] In re Manufacturers' Box & Lumber Co., 251 F. 957.

On the other hand, the interest which a member has in a nonstock corporation, which is usually evidenced by a certificate of membership, at common law is not transferable. In a certain case the plantiff acquired a certificate of membership from one who was formerly a member of a nonstock corporation, but it was held that this did not constitute the plaintiff a member of the corporation.[95] Certificates of membership could be made transferable by statute, by charter, or by authorized by-laws, but in the absence of specific provisions on the subject they are not transferable. Fundamentally, therefore, certificates of membership are not transferable, whereas shares of stock fundamentally are transferable.

Churches were among the first organizations to be incorporated. It is obvious that church membership, from its peculiar personal quality, is essentially nontransferable. This personal element, which is so apparent in the case of church organizations and in social clubs and kindred organizations, may have been responsible for the establishment of the concept, both in the decisions of the courts and in the minds of the people, that membership in a nonstock corporation is not assignable. This principle is basic, and in the absence of special provision on the subject, is applicable. In view of the foregoing, it is apparent that fundamentally a nonstock association can control its membership better than can a stock association.

At common law the stock of a member of a corporation could not be forfeited and the member expelled from the corporation, whereas nonstock corporations possess the inherent right to expel members for cause.[96] From an early date it was recognized as one of the inherent powers of a nonstock corporation to expel members for cause. Without any charter or statutory provisions on the subject, a nonstock corporation may for cause expel members, but this is not true with respect to a stock corporation. If the charter of a nonstock corporation is silent on the power of expulsion and there are no statutory provisions on the subject, the decided weight of authority is that a member may be expelled for only three reasons: (1) Offenses of an infamous nature indictable at common law; (2) offenses against the members' duty to the corporation; (3) offenses compounded of the two.

In the absence of restrictions in the charter, contracts, or by-laws of a nonstock corporation or of a statutory provision on the subject, a member may withdraw at any time, and no acceptance is required.[97] On the other hand, shareholders or members of a corporation having capital stock can not, strictly speaking, withdraw from the corporation.[98]

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[94] Cook on Corporations, 8th Ed., sec. 331; Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558; Boston Music Hall v. Cory, 129 Mass. 435.

[95] American Live Stock Commission Co. *v.* Chicago Livestock Exchange, 143 Ill. 210, 18 L. R. A. 190.

[96] Fletcher, Cyclopedia Corporations, v. 6, sec. 3960.

[97] Ewald *v.* Medical Society, 130 N. Y. S. 1024 (reversed on other grounds, 144 App. Div. 82); Finch *v.* Oake, 73 L. T. R. (N. S.) 716.

[98] Picalora *v.* Gulf Cooperative Co., 123 N. Y. S. 980.

This brief sketch on the differences between stock or nonstock corporations explains why a stock corporation is generally thought of as a commercial organization; that is, as an organization in which money, rather than the personnel of the membership, is the dominant factor. By appropriate charter or statutory provisions a stock corporation may exercise control over its membership resembling that exercised by nonstock corporations. Indeed, no reason is apparent why the legislature could not endow stock corporations, at least at the time of their creation, with as complete control over their membership as that possessed by nonstock corporations. In many jurisdictions at this time statutes providing for the incorporation of cooperative associations with capital stock exist which give such associations control over their members or stockholders comparable with that fundamentally possessed by nonstock corporations.

Frequently the phrase "nonprofit, nonstock" is used with reference to an association, as though the organization would be one for profit if it were formed with capital stock. This is a mistake. An association is not nonprofit because it is formed without capital stock, but because of the manner in which it operates. In other words, an association formed with capital stock may operate on a nonprofit basis just as well as an association formed without capital stock. An association must have money, and if it is not raised through the sale of stock it must be obtained in some other way. Indeed capital stock is frequently sold at a price comparable with that ordinarily paid for a certificate of membership in a nonstock association; so that it would be possible in theory to raise as much money through the sale of certificates of membership as it would be through the sale of stock certificates. It is the way that an association operates that determines whether it is a profit-making institution rather than whether it is formed with or without capital stock.

RESTRICTIONS AS TO TRANSFER OF STOCK

May an incorporated cooperative association or any other corporation restrict the transfer of its stock so as to prevent its being held by nonproducers? The answer is "Yes," if appropriate statutory authority exists in the State in which the association is incorporated. Many of the statutes providing for the incorporation of cooperative associations contain provisions restricting the issuance of common stock, or its transfer to nonproducers. Associations formed under statutes that contain such provisions are thereby prohibited from issuing common stock to nonproducers, and in the event of a member's attempting to transfer his stock to a nonproducer, the association could refuse to recognize the same. Under such statutes only the holders of the common stock are entitled to vote, and the holders of the preferred stock which may be issued by such associations under such statutes, are barred from voting by a provision in the law.

In some States and in some instances in which there was no statutory authority for the restriction, they have been upheld. The courts have recognized the importance of allowing cooperative associations to restrict the transfer of their stock so as to prevent its purchase by those who would be antagonistic thereto, and thereby defeat the purpose for which the association was formed.[99]

In the North Dakota case just cited the court said:

> If stock in co-operative corporations could be sold and transferred the same as corporate stock in ordinary business corporations, to any person whom the stockholder saw fit, then it would be possible for persons whose interests were antagonistic to the co-operative association to become members therein, and thereby defeat the very purpose for which the corporation was formed. So it seems not only proper, but necessary, in order that such corporations may continue and accomplish the purpose for which they are organized, to permit restrictions to be placed upon the right to transfer and own stock therein.

If a statute of the State expressly restricts the transfer of stock except under certain conditions, the matter is clear. This was the situation in a Minnesota case[1] where the statute under which the association was incorporated provided that "No person shall be allowed to become a shareholder in such association except by the consent of the managers of the same." The court said: "We have no doubt of the validity of such a restriction on the transfer of shares." If the statute of the State under which the association is incorporated authorizes the inclusion of a provision in the articles of association or the certificate of incorporation, or the by-laws, restricting the transfer of stock, there would seem to be no doubt concerning the right of an association to adopt such a restriction and it would be binding on innocent third persons, as one is charged by law with notice of the law under which an association is formed and of what it permits.[2]

From the cases that have come before the courts it is apparent that the required statutory authority need not expressly authorize restrictions on the transfer of stock, but general language dealing with this subject would seem to be enough. A few illustrations from decided cases will shed light on this matter. In a New York case the certificates of incorporation of each of the three corporations involved, "* * * provided that no stock shall be transferred until it was first offered for sale to the other stockholders on terms and conditions to be fixed by the by-laws or by an agreement between stockholders, but, in case the offer to sell were refused, the stock would be no longer subject to the conditions." The court held this provision and the by-laws and the agreement connected therewith valid and enforceable. Notice of the restrictions on the sale of stock was stamped on each certificate of stock.[3] Section 10 of the General Corporation Law of New York provides that "The certificate of incorporation of any corporation may contain any provisions for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligation or the performance of any duty imposed by law." It was apparently in pursuance of this provision that the restrictions on the right to transfer the stock were included in the certificates of incorporation.

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[99] Chaffee *v.* Farmers' Co-op. Elevator Co., 39 N. D. 585, 168 N. W. 616; Carpenter *v.* Dummit [Burley Tobacco Growers' Cooperative Ass'n], 221 Ky. 67, 297 S. W. 695.

[1] Healey et al. *v.* Steele Center Creamery Ass'n, 115 Minn. 451, 133 N. W. 69.

[2] Longyear *v.* Hardman, 219 Mass. 405, 106 N. E. 1012, Ann. Cas. 1916D. 1200; Casper *v.* Kalt-Zimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754.

[3] Bloomingdale *v.* Bloomingdale, 177 N. Y. S. 873.

A statute may authorize associations incorporated under it to adopt by-laws restrictive of the right to transfer stock. This was the situation in a North Dakota case.[4] The statute empowered associations incorporated under it "to regulate and limit the right of stockholders to transfer their stock" and "to make by-laws for the management of its affairs, and to provide therein the terms and limitations of stock ownership." It was held that a by-law which provided that "No stockholder shall transfer his stock without first giving the corporation ninety days' notice and option to purchase said stock at par, plus the accrued and undivided dividends, which are payable per share" was valid. The by-law was referred to on the face of the certificates of stock.

A similar conclusion was reached in an Ohio case involving an analogous statutory provision.[5] If the statute under which an association is incorporated authorizes the inclusion in the articles of association or the certificate of incorporation, or in the by-laws, of a provision restricting the transfer of its stock, such a provision will be enforced by the courts of the State where suit is brought, although the association was incorporated in another State. These were the facts in the case last mentioned. In that case the corporation was incorporated in Delaware, but the transactions relative to the stock took place in Ohio, where the corporation had its principal place of business, and the suit was brought there.

A Kentucky case involved a subsidiary warehouse corporation of the Burley Tobacco Growers' Cooperative Association. Although there was no authority in the general corporation laws of the State under which the warehouse corporation was formed that authorized the language included in its articles of incorporation and by-laws saying that the common stock should be sold and issued only to members of the association, the court was of the opinion that the public policy of the State favored such restrictions in the case of cooperative associations because the cooperative statute authorized them. Therefore the court held that the warehouse corporation was not required to issue common stock to a party not a member of the association who had taken an assignment in good faith from one of its members, but held that the assignee was entitled to a lien on the stock in the hands of the association.[6]

All courts hold reasonable restrictions on the transfer of stock valid if statutory authority therefor exists, but if no statutory authority exists the courts are not in harmony regarding the validity of such restrictions.[7] If on the face of a certificate of stock notice is given that it may be transferred only under certain conditions or to members of a specified class, this would appear to be sufficient notice to a prospective purchaser to prevent his acquiring title thereto in some of the States, even though no statutory authority existed for the restriction, barring a statutory provision to the contrary.[8]

Even though a by-law restricting the right to transfer stock is unauthorized by the statute under which the corporation is formed, such by-laws have been enforced as contracts between the corporation and its members,[9] although a contrary conclusion has been reached.[10]

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[4] Chaffee *v.* Farmers' Co-op. Elevator Co., 39 N. D. 585, 168 N. W. 616.

[5] Nicholson *v.* Franklin Brewing Co., 82 Ohio St. 94, 91 N. E. 991, 19 Ann. Cas. 699.

[6] Carpenter *v.* Dummit, 221 Ky. 67, 297 S. W. 695.

[7] Carpenter *v.* Dummit, 221 Ky. 67, 297 S. W. 695.

[8] Wilkinson *v.* Home Bank, 137 Tenn. 198, 192 S. W. 920; Jewell *v.* Nuhn, 173 Iowa 112, 155 N. W. 174, Ann. Cas. 1918D, 356.

Closely akin to the question of whether a cooperative association may restrict the transfer of its stock is the right of such an association to purchase its stock from its members. Many of the statutes providing for the formation of cooperative associations contain provisions authorizing the associations to purchase or redeem their stock. If such provisions are present in the statute under which an association is formed, it is clear that it has the right to do so, assuming that the constitution of the State does not contain a provision to the contrary. Even though no statutory authority for the purchase or redemption of stock is contained in the statute under which the association is formed, generally speaking it would have the right to do so because at common law a corporation, by the weight of authority, may purchase its own stock if solvent and if no injury to creditors results.[11]

Corporations are prohibited by statute in some States from using any portion of their capital stock (assets) in the purchase of their own stock.[12]

WHO MAY BECOME MEMBERS

May a cooperative association select its members and thus determine for whom it will market products or furnish supplies? Judging by the decisions of the courts with respect to other organizations the answer is "Yes." In the absence of a statute prescribing rules relative to the admission of members or stockholders, an association at common law is free to accept some and reject others. With respect to nonstock associations, numerous court decisions support this view.[13] The Supreme Court of Minnesota has said: "The right to membership in a corporation might by a provision in its articles of incorporation, be restricted to persons of a certain nationality where the provision was not inconsistent with any statute."[14]

The courts have universally declared that stock corporations have the right to determine to whom they will sell their stock.[15] The right of associations to restrict the transfer of their stock is discussed elsewhere. Membership in a nonstock association or a certificate of membership evidencing the same is not transferable[16] in the absence of a statutory, charter, or by-law provision making it transferable.

With respect to the general subject under discussion it should be remembered that those engaged in a private business at common law may arbitrarily refuse to sell to or buy from others.[17] Banks, at common law, may arbitrarily select their depositors;[18] and even a doctor, although the only one available, in the absence of a statute requiring him to serve all who come, has the right to determine arbitrarily with whom he will have dealings.[19]

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[9] New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Model Clothing House *v.* Dickinson, 146 Minn. 367, 178 N. W. 957.

[10] Steele *v.* Farmers' & Merchants' Mutual Tel. Ass'n, 95 Kan. 580, 148 P. 661; Brinkerhoff-Farris Trust & Savings Co. *v.* Home Lumber Co., 118 Mo. 447, 24 S. W. 129.

[11] Whitney *v.* Farmers' Co-op. Grain Co., 110 Neb. 157, 193 N. W. 103; Cole *v.* Cole Realty Co., 169 Mich. 347, 135 N. W. 329.

[12] Poultry Producers of Southern California, Inc., *v.* Barlow, 189 Cal. 278, 208 P. 93; Poultry Producers of Central California (Inc.) *v.* Murphy, 64 Cal. App. 450, 221 P. 962.

[13] McKane *v.* Adams as President of the Democratic General Committee of Kings Co., 123 N. Y. 609; Connelly *v.* Masonic Mutual Benefit Ass'n, 58 Conn. 552, 20 A. 671; State *v.* Sibley, 25 Minn. 387; LaSalle County Farm Bureau *v.* Thompson, 245 Ill. App. 413; W. G. Press & Co. *v.* Fahy, 313 Ill. 262, 145 N. E. 103; 6 R. C. L., par. 371; 25 R. C. L. 54.

[14] Blien *v.* Rand, 77 Minn. 110.

[15] 14 C. J. 838.

[16] American Live-Stock Commission Co. *v.* Chicago Live-Stock Exchange, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385.

[17] Federal Trade Commission *v.* Raymond Bros. Clark Co., 263 U. S. 565.

An association could adopt rules or by-laws to be followed in determining whether a person was eligible to be admitted to membership. For instance, an association could adopt a by-law to the effect that only producers who were members of some other organization might buy stock or be admitted to membership.[20]

RIGHTS OF MEMBERS

In a practical and nonlegal sense the members of an association are the association. Members have the right (1) to choose and to remove the directors of an association;[21] (2) to adopt or change its by-laws;[22] (3) to require the officers and directors (agents) of an association to keep within the law, the charter of the association. its by-laws, and marketing contracts;[23] (4) to hold the officers and directors who fail to do so accountable for any losses suffered by members by reason of any departure;[24] and (5) to examine the books[25] and property[26] of the association. The last right is subject to such restrictions as may have been agreed to and is subject to the further restriction that the request to examine the books and property of the association is made in good faith and with a view to its exercise at a proper time.

The Supreme Court of Ohio has said:[27]

> Our conclusion from an examination of many authorities is that, when a stockholder admits, or the fact is found by the court on evidence, that he has acquired his stock for the purpose of creating a basis for the demand to inspect and copy books and papers, and that he intends to use the information sought, when secured, in such manner as will depreciate the value of the assets of the company and the value of the stock of all other stockholders, he is not entitled to a mandatory injunction requiring the corporation to accede to his demand.

The principles stated in the foregoing quotation are applicable to a cooperative association. In determining whether a member of an association should be allowed to obtain information with respect to the business of the association, the purpose for which the member is seeking the information and the use to which the information will be put after being obtained should be considered. If the information sought does not relate squarely to the products of the member, or if the effect on the rights and the financial returns of the membership as a whole will be adverse, the officers of an association should be slow in giving the member access to the books and records of the association.

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[18] Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 111 Am. St. Rep. 198, 1 L. R. A. (N. S.) 1130.

[19] Hurley *v.* Eddingfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198.

[20] Connelly *v.* Masonic Mutual Benefit Association, 58 Conn. 552, 20 A. 671, 9 L. R. A. 428; Carpenter *v.* Dummit [Burley Tobacco Growers' Cooperative Ass'n], 221 Ky. 67, 297 S. W. 695.

[21] See secs. 12 and 15 of the Bingham Cooperative Marketing Act of Kentucky, pp. 121 and 122 of appendix.

[22] See sec. 10 of the Bingham Cooperative Marketing Act of Kentucky, p. 120 of appendix.

[23] McCauley *v.* Arkansas Rice Growers Co-op. Ass'n. 171 Ark. 1155, 287 S. W. 419.

[24] Fergus Falls Woolen Mills Company *v.* Boyum, 136 Minn. 411, 162 N. W. 516.

[25] Re Petition of Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461.

[26] Hobbs *v.* Tom Reed Gold Min. Co., 164 Cal. 497, 129 P. 781, 43 L. R. A. (N. S.) 1112.

[27] American Mortgage Company *v.* Rosenbaum, 114 Ohio St. 231, 151 N. E. 122; see also Otis-Hidden Co. *v.* Scheirich, 187 Ky. 423, 219 S. W. 191, 22 A. L. R. 24 to 106.

In a Wisconsin case[28] a cooperative association brought suit to compel a member to perform his marketing contract. The member sought the unrestricted right to examine the books and papers of the association to obtain information with which to defend the suit. The lower court held that the member had the right to examine the books and papers secretly, but on appeal the supreme court of the State said:

> The order, when granted, should be upon affidavit of the defendant or his attorney specifying the particular documents to be examined and a showing of relevancy and materiality. The order should fully protect the plaintiff in its rightful custody of its books and records and in its right to supervise the examination to the extent that no improper use shall be made of its records, and that none are misplaced, destroyed, or lost. It should further reasonably limit the time in which the examination shall be made.

TERMINATION OF MEMBERSHIP

In a cooperative association formed with capital stock a person continues to be a member until a valid transfer, redemption, or forfeiture of his stock is effected. He can not resign.[29] Fundamentally, and this is the rule in the absence of stipulations to the contrary, on the transfer of the stock of an association held by an individual the purchaser stands in the place of the former owner as to rights and liabilities, and the former owner has no further interest in the association and is free from any further liability on account of the stock.[30] Of course, a member of an association may not defeat his marketing contract therewith by a transfer of his stock.

Fundamentally, in a nonstock cooperative association a person continues to be a member until he resigns, is expelled, or his membership is terminated in accordance with law.

In the case of associations that require the payment of annual dues, the failure to pay such dues within the time prescribed does not terminate a membership in the absence of a by-law or stipulation to that effect; and if such dues are not paid, a suit may be successfully maintained for their recovery.[31]

Although the marketing contract of a stockholder or member has expired, his stock is not forfeited or his membership terminated on account of that fact alone. Many of the cooperative statutes specifically authorize the associations formed under them to adopt by-laws with respect to the redemption or forfeiture of stock and the termination of membership. Generally, such by-laws require positive and affirmative action, usually by the board of directors, before a membership is terminated in the case of a nonstock cooperative or before stock may be forfeited or a stockholder compelled to transfer his stock.

Generally speaking, unless prohibited by statute, an association would be free at the time a producer was admitted to membership to prescribe the conditions under which his membership should terminate in the case of a nonstock organization[32] or the conditions under which he would agree to transfer his stock either to the association or to a person designated by it. Stipulations of this character could be made, as a general rule, although there was no specific statutory authority for them, assuming that they did not conflict with the law.

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[28] Northern Wisconsin Co-op. Tobacco Pool *v.* Oleson, — Wis. ——, 211 N. W. 923.

[29] Picalora *v.* Gulf Co-operative Co., 123 N. Y. S. 980.

[30] Whitney *v.* Butler, 118 U. S. 655.

[31] LaSalle County Farm Bureau *v.* Thompson, 245 Ill. App. 413; Boston Club *v.* Potter, 212 Mass. 23, 98 N. E. 614.

Fundamentally, the termination of a marketing contract or ceasing to do business with an association does not terminate a membership in a nonstock association[33] or cause a stockholder in a stock association to cease to be a stockholder.

At the time an association is formed, consideration should be given to the inclusion of provisions with reference to the termination of membership in the case of a nonstock association, and in the case of an association formed with capital stock suitable provisions should be made so that all voting stock may be kept in the hands of active patrons of the association. Consideration should also be given to the inclusion of provisions with respect to the voting power of members or stockholders in the event they become inactive. Under the cooperative statutes, associations usually have great latitude with respect to these matters.

In the case of nonstock associations, certificates of membership are not transferable at common law unless made so by statute, bylaw, or contract. In the case of associations formed with capital stock, generally speaking, the provisions restricting the transfer of the stock or giving the association the authority to purchase the same under certain conditions should be set forth on the certificates of stock. Such provisions are, as a rule, authorized by the cooperative statutes and, even independent of such statutes, are generally held valid.[34]

INTEREST IN ASSOCIATION

As cooperative associations acquire property and establish reserves, inquiry is frequently made concerning the financial or property interest which members have in their associations. In considering this matter, certain fundamental propositions should be kept in mind. Neither a stockholder of a stock association, nor a member of a nonstock association has title to any part of its assets.[35] Again a member or stockholder of an association may be a creditor thereof. He is a creditor not because he is a member or stockholder, but because the association, independent of that fact, owes him money; such indebtedness may exist because the association, usually in a contract or in its by-laws, has agreed to make certain payments to him. Purchase and sale marketing contracts and certificates of indebtedness illustrate this debtor-creditor relationship.

Aside from the claims that a member may have against an association as a creditor, what financial interest does he have in his association? This question, generally speaking, does not arise unless a producer ceases to be a member or stockholder of an association.

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[32] Stevenson *v.* Holstein-Friesian Ass'n of America, 302 F. (2d) 625; George *v.* Holstein-Friesian Ass'n of America, 238 N. Y. 513, 144 N. E. 776.

[33] Burley Tobacco Growers' Co-op. Ass'n *v.* Tipton et al., 227 Ky. 297, 11 S. W. (2d) 119.

[34] Carpenter *v.* Dummit [Burley Tobacco Growers' Co-op. Ass'n], 221 Ky. 67, 297 S. W. 695.

[35] Rhode Island Hospital Trust Co. *v.* Doughton, Commissioner, 270 U. S. 69, 46 S. Ct. 256.

Prior to the dissolution of an association, a member or stockholder of an association at common law has no interest therein that he can compel the association to recognize. Money paid by members of an association as membership dues, or fees, or for the purchase of stock, or money deducted by an association in pursuance of authority to do so from the returns received from the sale of products of members, for the purpose of establishing reserves, or for the acquisition of buildings, does not constitute debts due by the association to the members unless the association has previously agreed to return or pay back the amounts involved.

At common law if a member resigns or is expelled from a nonstock association he is entitled to receive nothing therefrom because of this fact. In other words, in nonstock associations one who ceases to be a member from any cause, in the absence of express provisions to the contrary, loses his interest in the corporation and in turn is free from any further liability. In a Florida case [36] certain members withdrew from a fruit-marketing association and then instituted a suit against it to obtain compensation for "their interest" in the association. Apparently there was no provision, either statutory [37] or otherwise, with reference thereto. The court held that the members on withdrawing from the association lost all their rights therein and that all of the assets of the association could be used for the benefit of the remaining members and that nothing was due the members who had withdrawn.

A clear distinction should be drawn between amounts claimed by a member under his contract with an association and amounts claimed by him by reason of his membership therein. In an Oregon case,[38] an association that was engaged in growing apples was a member of a marketing association. The former association canceled its membership in the latter and later brought suit against this association on its contract. The court said that:

> Under the terms and conditions of the contract, standing alone and complete within itself, the grower [association] is entitled to receive each year the balance of any net proceeds from an annual pool, within 30 days after the receipt of the money by the association, and it is the duty of the association to render an annual statement of the receipts and disbursements of each pool. The record is conclusive that such statement was never made and such accounting was never rendered to the plaintiff; that, after paying the expenses of the association named in the contract, there is a surplus estimated to be about $80,000.

The marketing association claimed that by reason of a by-law which provided that the cancellation of the standard contract shall "cancel and terminate the membership of such grower, together with all benefits accruing thereunder, and all voting power, right, and interest of every kind and nature shall immediately cease and terminate," that it was entitled to retain the money in question and that the plaintiff was entitled to no part thereof. The court, however, held that the by-laws did not "apply to a surplus accruing from the sale and purchase of fruit and charges therefor, under an express contract, but are confined and limited to the right, title, and interest which a corporation or individual may have in and to the net assets of the association by reason of membership therein subject to the payment of all of its debts and liabilities. They do not give to the association the right to keep the money which it promised and agreed to pay another under its express contract." In other words, the member was entitled to nothing by reason of his membership, but was entitled to payment in accordance with his marketing contract.

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[36] Clearwater Citrus Growers' Ass'n *v.* Andrews, —— Fla. ——, 87 So. 903; see also Union Benev. Soc. No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38; Dade Coal Co. *v.* Penitentiary Co., 119 Ga. 824; Henry *v.* Cox, 25 Ohio App. 487, 159 N. E. 101; Mo. Bottlers' Ass'n *v.* Fennerty, 81 Mo. App. 525, 5 C. J. 1360, 19 R. C. L. 1267.

[37] This was before the passage of the 1923 cooperative act of Florida, laws of 1923, ch. 142.

[38] Hood River Orchard Co. *v.* Stone, 97 Or. 158, 191 P. 662, 666.

If the contracts or by-laws of an association state, for instance, that unless a person is a member of the association at or prior to a specified time, he shall not be entitled to the return of any money advanced by him, then this language is conclusive and bars from any recovery a person who was not a member prior to the time fixed.[39]

In the case of associations formed with capital stock, at common law, a person on the sale or transfer of his stock has no further interest in the association and no claims against it except such claims as are independent of stock ownership.[40] This is the rule unless it has been changed by statute, by contract, or by a provision in the by-laws.

In contrast with the common-law rule applicable to nonstock associations many of the cooperative statutes providing for the formation of cooperative associations require the incorporators of such nonstock associations to state in the articles of incorporation[41] "whether the property rights and interests of each member shall be equal or unequal; and if unequal, the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules." Such statutes also authorize associations formed under them to adopt by-laws relative to the interests of members therein and further provide that "In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal."[42] The statutory provisions referred to are applicable only to associations formed under statutes that contain them.

Some associations are authorized in their marketing contracts to make deductions for "creating funds for credits and other general commercial purposes (said funds not to exceed 1 per cent of the gross resale price)." Such funds constitute a reserve that may be used for the purposes specified and a member may not successfully sue an association for their return.[43] Such funds might be lost or dissipated in the conduct of the business of an association without liability therefor.

At common law on the dissolution of a nonstock cooperative association only the persons who are then members are entitled to share in the distribution of the assets remaining after the payment of its debts.[44] In the case of an association formed with stock, only stockholders at the time of the dissolution are entitled to share in the net assets of the association. In the case of nonstock associations, the distribution is made on a "per man basis," whereas in the case of a stock association the distribution is made on a stock basis.[45]

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[39] Webster Implement & Automobile Co. *v.* St. Louis Automobile Mfrs.' & Dealers Ass'n (Mo. App.), 181 S. W. 1025.

[40] Whitney *v.* Butler, 118 U. S. 655.

[41] See sec. 8 of Bingham Cooperative Marketing Act of Kentucky on p. 120 of appendix.

[42] See sec. 10 of Bingham Cooperative Marketing Act on p. 120 of appendix.

[43] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark.1155, 287 S. W. 419; Burley Tobacco Growers' Co-op. Ass'n *v.* Tipton et al, 227 Ky. 297, 11 S. W. (2d) 119; Burley Tobacco Growers' Co-op. Ass'n *v.* Brown, — Ky. —, 17 S. W. (2d) 1002.

In the case of associations that have preferred stock, the preferred-stock holders by express provision are frequently given preference over the common-stock holders in the distribution of the assets of an association on its dissolution.

Before the assets of a cooperative association would be distributed among the members or stockholders, the claims which the members had against the association as creditors thereof would first be met, if funds were available. For instance, if the association had issued certificates of indebtedness to its members, these would be paid before any distribution would be made among members or shareholders because of the fact that they were members or shareholders.

DISSOLUTION

Associations are formed by the State, and the charter represents an agreement between the State and the incorporators.[46] Owing to the manner in which corporations are created, the State has control over their dissolution. There are statutes in the various States with respect to this matter. Through unanimous consent on the part of the members of an association, it may be dissolved.[47]

The right of a majority of the stockholders or members at common law to force a dissolution of a corporation against the opposition of the minority is not so well established. Some authorities hold that the majority can force a dissolution,[48] whereas a contrary doctrine has been laid down.[49] Of course, if there are statutory or charter provisions on the subject, they control.

EXPIRATION OF CHARTER

A corporation may cease to exist through the expiration of its charter if the duration of the corporation is limited, and its charter may be forfeited by the State for unauthorized or unlawful action or conduct,[50] or the charter may be repealed through the reserved power of the State.[51]

"The dissolution of a corporation is not effected by a failure to elect officers or by a sale and assignment of all of its corporate property or by a cessation of all corporate acts." [52]

The fact that an association is placed in the hands of a receiver does not effect a dissolution; [53] nor does the bankruptcy of an association result in its dissolution.[54] A charter may be canceled by the State for fraud in its procurement.[55]

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[44] Hopkins *v.* Crossley, 138 Mich. 561, 101 N. W. 822; Clearwater Citrus Growers' Ass'n *v.* Andrews, 81 Fla. 299, 87 So. 903.

[45] Krebs *v.* Carlisle Bank, 14 Fed. Cases 856; Central Sav. Bank *v.* Smith, 43 Colo. 90.

[46] Syrian Antiochean St. George Orthodox Church *v.* Ghize, 258 Mass. 74, 154 N. E. 839.

[47] Mobile & Ohio R. R. Co. *v.* The State, 29 Ala. 573, 586.

[48] State *v.* Chilhowee Woolen Mills, 115 Tenn. 266, 89 S. W. 741.

[49] Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53; Stockholders of Jefferson County Agr. Ass'n *v.* Jefferson County Agr. Ass'n, 155 Iowa 634, 136 N. W. 672; Theis *v.* Spokane Falls Gaslight Co., — Wash. —, 74 P. 1004.

[50] Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231.

[51] Swan Land & Cattle Co. *v.* Frank, 148 U. S. 603, 611.

[52] Brock *v.* Poor, 216 N. Y. 387, 111 N. E. 229; Belle City Malleable Iron Co. *v.* Clark, 172 Minn. 508, 215 N. W. 855.

[53] Riverside Oil & Refining Co. *v.* Lynch, 114 Okl. 198, 243 P. 967.

If those interested in an association continue to do business in its name after the expiration of the charter, or after the dissolution of the association, they incur personal responsibility and liability.

In some of the States there are statutes providing for the renewal of charters of corporations that are about to expire, or after they have expired, provided that an application for renewal is filed, usually with the secretary of state, before a certain date.

BOARD OF DIRECTORS

Membership on a cooperative board of directors is ordinarily looked upon as a post of honor, but the board member who has examined the statutes and court decisions on the subject will also look upon the office as a post of great legal responsibility. Not only does the welfare of the cooperative rest upon the board as a group, but the office of director carries with it the possibility of great personal liability both at common law and under statutes.

In the discussion which follows, the rules and principles stated are the common-law rules, unless a statutory provision is referred to; and they are as applicable to directors of cooperative corporations as to directors of corporations of any other type.

First, all the corporate powers of an association are in its directors; that is, the directors of an association collectively and primarily possess all the powers that the association has under the law.[56] It is true that these powers are executed by the officers, agents, and employees of the association, but the authority for their acts is found in the board of directors. They determine either expressly or by implication, directly or indirectly, the acts to be performed and the plans and methods to be followed by the officers, agents, and employees of the association. It is the function and duty of directors of an association to direct and supervise in a fundamental way the activities of the association. The members or stockholders of an association through appropriate by-laws, undoubtedly could prescribe rules which the directors should observe in the conduct of the business of the association, for it will be remembered that a director is an agent and the general rules of agency apply to him in his relation to the corporation.[57]

The first directors of a cooperative association under the statutes providing for the formation of cooperative associations are usually named in the articles of incorporation, and generally in practice they are the incorporators. These directors are sometimes referred to as the incorporating directors. They are usually authorized to serve until their successors are elected and qualified. The members or stockholders elect the successors of these directors, usually at a special meeting or at the first annual meeting of the association.

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[54] State *v.* Farmers' Co-op. Packing Co., 50 S. D. 627, 211 N. W. 602; Haynes *v.* Central Business Property Co., —— Wash. ——, 249 P. 1057.

[55] State *v.* U. S. Realty Imp. Co., —— Del., Ch. ——, 132 A. 138.

[56] Elggren *v.* Woolley, 64 Utah 183, 228 P. 906.

[57] Nicholson *v.* Kingery, —— Wyo. ——, 261 P. 122; Holcomb *v.* Forsyth, —— Ala. ——, 113 So. 516.

Unless required by statute, charter, or by-laws, it is not necessary that directors be members of the association.[58] Directors are elected for specified periods of service, sometimes prescribed in the law of the State; but usually upon the expiration of the term for which elected, a director does not thereby cease to be a director, but continues as such, barring resignation or expulsion, with all of the rights and responsibilities incident thereto until the election and qualification of his successor.[59]

A director or officer of an association at common law may resign at will,[60] and a statute providing that directors shall hold office for one year and until their successors have been elected and qualified does not prevent resignation during the year.[61]

COMPENSATION OF DIRECTORS

The directors of an association have no inherent power to fix their own salaries or compensation as directors or, if they are officers, their salaries or compensation as officers.[62] In other words, unless the statute under which an association is formed, its articles of incorporation, or an authorized by-law, permits directors to fix their salaries or determine their compensation, they do not have such authority. This authority is possessed by the members of an association, who may, through appropriate by-laws or otherwise, either fix the salaries of the directors of an association or authorize the fixing of such salaries by the board of directors. Both the directors and the officers of a corporation are presumed to act without compensation in performing the duties of their offices unless provision for compensating them has been made,[63] but if any of them are working regularly for the corporation with respect to matters not involving their duties as directors or officers, it will be assumed that reasonable compensation will be made by the corporation for such services.[64]

Many of the cooperative statutes state that " an association may provide a fair remuneration for the time actually spent by its officers and directors in its service." In this language, or in language similar thereto, the word association means members; and under such language the directors or officers are not authorized to fix their own salaries or compensation. The members should do so in the by-laws.

MEETINGS OF THE BOARD

How must the directors who compose the board act to bind the association? " In order to bind the corporation, the board must act and act as a board either in a regular or in a special meeting called for the purpose."[65] In other words, the rule is established that in matters affecting the property or policies, or involving the exercise of discretion, the directors can bind the association only when acting in a properly convened meeting of a board. A director merely by virtue of his office has no authority to act for or bind an association except in meetings of the board of directors; and if a director by virtue of his office should attempt, for instance, to release a member from his contract the act would be void.[66]

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[58] Wright *v.* Floyd, 43 Ind. App. 546, 86 N. E. 971; Wight *v.* Springfield & New London Railroad Co., 117 Mass. 226, 19 Am. Rep. 412.

[59] Lucky Queen Min. Co. *v.* Abraham, 26 Or. 282, 38 P. 65; Grant *v.* Elder, 64 Colo. 104, 170 P. 198; Weil *v.* Defenbach, 36 Idaho 37, 208 P. 1025.

[60] Ewald *v.* Medical Society, 130 N. Y. S. 1024 (reversed on other grounds, 144 App. Div. 82).

[61] Briggs *v.* Spaulding, 141 U. S. 132.

[62] Bennett *v.* Klipto Loose Leaf Co., 201 Iowa 236, 207 N. W. 228; Holcomb *v.* Forsyth, —— Ala. ——, 113 So. 516.

[63] First Nat. Bank of Allen *v.* Daugherty, 122 Okl. 47, 250 P. 796.

[64] Navco Hardwood Co. *v.* Bass, 214 Ala. 553, 108 So. 452.

[65] Jackson *v.* Bonneville Irr. Dist., 66 Utah 404, 243 P. 107; Honaker *v.* New River, H. & W. R. Co., 116 Va. 662, 82 S. E. 727; Nicholson *v.* Kingery, —— Wyo. ——, 261 P. 122; Raish *v.* Orchard Canal Co., 67 Mont. 140, 218 P. 655.

Even a majority of the board acting as individual directors or in a "board meeting," illegal for any reason, can not bind the association.[67] Action by directors at an illegal board meeting may be adopted and ratified at a later legal meeting of the board, but directors who were not notified of a board meeting can not later, as individuals, waive the failure to give notice or concur in the action taken at the illegal meeting so as to bind the association.[68] It appears that a director may waive notice of a board meeting prior thereto,[69] but it can not be done subsequently so as to validate the action taken. If a director has notice, and fails to attend the board meeting, his absence does not affect action taken, provided a qualified quorum was present.

QUORUM

What constitutes a quorum of the board of directors? At common law and in the absence of a statutory, charter, or by-law provision changing the rule, the general rule is that a majority of directors of a corporation who are not personally interested in the subject before the board, and who are otherwise qualified, is necessary to constitute a quorum of the board of directors for the transaction of business.[70] Thus, if a majority of qualified directors or the number, if any, specified in the statute, the charter or the by-laws, do not attend a duly called board meeting, any business transacted by the minority at such meeting is at least voidable. Directors can not vote by proxy.[71]

If a qualified quorum is present at a properly convened board meeting, a majority thereof at common law may exercise any powers vested in the board of directors.[72] It has been held that the failure of a director, necessary to constitute a quorum, to vote upon a proposition before the board results in no quorum with respect thereto;[73] and there ceases to be a quorum when a director who is necessary to a quorum withdraws from a meeting. A director present but not voting is counted for the negative.[74] If a statute or by-law requires, say a two-thirds vote of the members present, the failure of members present to vote renders the action taken a nullity if two-thirds of those present do not vote therefor.[75]

All of the foregoing is based upon the theory that each director who attends the meeting is qualified to act because "all of the directors constituting a quorum must be qualified to act. If one of the directors whose presence is necessary to constitute a quorum, or whose vote is necessary to constitute a majority of a quorum, is disqualified by reason of his personal interest, any act done by the body is invalid,"[76] or at least voidable. Some courts apparently hold that a director who is personally interested in a proposition may be counted in determining if a quorum was present at the time the proposition was voted upon, leaving its validity, after subjecting it to severe scrutiny, to depend upon its fairness toward, and effect upon, the corporation, with the burden of showing its fairness, on the director.[77]

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[66] California Canning Peach Growers *v.* Harris, —— Cal. App. ——, 267 P. 572.

[67] United States *v.* Interstate R. Co., 14 F. (2d) 328.

[68] United States *v.* Interstate R. Co., 14 F. (2d) 328.

[69] Holcombe *v.* Trenton White City Co., 80 N. J. Eq. 122, 82 A. 618; United States *v.* Interstate R. Co., 14 F. (2d) 328.

[70] In re Webster Loose Leaf Filing Co., 240 F. 779; Stanton *v.* Occidental Life Ins. Co., 81 Mont. 44, 261 P. 620; Cardin Bldg Co. *v.* Smith, 125 Okl. 300, 258 P. 910.

[71] Haldeman *v.* Haldeman, 176 Ky. 635, 197 S. W. 376; In re Acadia Dairies, Inc., —— Del. Ch. ——, 135 A. 846.

[72] In re Webster Loose Leaf Filing Co., 240 F. 779.

[73] North Louisiana Baptist Ass'n *v.* Milliken, 110 La. 1002, 35 So. 264.

[74] Commonwealth *v.* Wickersham, 66 Pa. St. 134; Stephany *v.* Liberty Cut Glass Works 76 N. J. Law 449, 69 A. 796.

[75] James R. Kirby Post No. 50 *v.* American Legion 258 Mass. 434, 155 N. E. 462.

CONFLICTING PERSONAL INTERESTS

If a resolution is adopted on a vote of interested directors, the resolution generally is voidable at the option of the association, if timely action with respect thereto is taken, and at least in some jurisdictions the "rule is equally applicable where the interests of other persons, not directors, are affected by the resolution."[78]

In fact, in some jurisdictions, if a member of a board of directors votes upon a proposition which is adopted and in which he has a personal interest, the action of the board may be set aside by the corporation, although the resolution would have been adopted apparently without the vote of the interested directors,[79] and in some States, a resolution of the type in question may be set aside by nonconsenting members of the corporation.[80]

As illustrating matters that would disqualify directors of an association from voting, if personally interested, or would at least bring the validity of the transaction into question, may be mentioned the sale of property of a director to the association,[81] the giving of a mortgage on association property to a director,[82] the execution of association notes to him,[83] or any transaction in which the personal interests of the director would be adverse to those of the association.[84] "In such cases, the court will not pause to inquire whether a director or trustee has acted fairly or unfairly; being interested in the subject matter, he may not as a trustee or director deal with himself and thus be subjected to the temptation to advance his own interest."[85]

In this connection, the Supreme Court of the United States has said:

> It is among the rudiments of the law that the same person can not act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them when-

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[76] In re Webster Loose Leaf Filing Co., 240 F. 779; Smith *v.* Los Angeles I. & L. Co-op. Ass'n, 78 Cal. 289, 20 P. 677; Holcomb *v.* Forsyth, —— Ala. ——, 113 So. 516; Stanton *v.* Occidental Life Ins. Co., 81 Mont. 44, 261 P. 620.

[77] Nicholson *v.* Kingery, —— Wyo. ——, 261 P. 122.

[78] Consumers' Ice & Coal Co. *v.* Security Bank & Trust Co., 170 Ark. 530, 280 S. W. 677.

[79] Tefft *v.* Schaefer, 136 Wash. 302, 239 P. 837, 1119.

[80] Tefft *v.* Schaefer, 136 Wash. 302, 239 P. 837, 1119.

[81] Dean *v.* Shingle, 198 Cal. 652, 246 P. 1049.

[82] In re Webster Loose Leaf Filing Co., 240 F. 779.

[83] Smith *v.* Los Angeles I. & L. Co-op. Ass'n, 78 Cal. 289, 20 P. 677.

[84] Wardell *v.* Railroad Co., 103 U. S. 651.

[85] In re Webster Loose Leaf Filing Co., 240 F. 779; Shakespear *v.* Smith, 77 Cal. 638, 20 P. 294, 11 Am. St. Rep. 327.

ever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They can not, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits.[86]

Another court has declared:

> It is a thoroughly well-settled equitable rule that anyone acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest. This rule is strict in its requirements and in its operation. It extends to all transactions where the individual's personal interests may be brought into conflict with his acts in the fiduciary capacity, and it works independently of the question whether there was fraud or whether there was good intention.[87]

At common law any transaction entered into by a director or officer of an association with anyone, which might conflict with his duty to the association, is voidable. For instance, an agreement by a director or officer of a cooperative association to keep another person in the employ of the association will not be enforced because the members are entitled to have the judgment of the director or officer "exercised with a sole regard to the interests of the company."[88] Again, it has been held that directors can not engage in a rival business to the detriment of the corporation.[89] Directors and officers of any corporation, cooperative or otherwise, may be compelled to account thereto for any gifts, gratuities, or bonuses received by them from persons with whom the association is or may be having business relations.[90] The object of this rule, like the others akin thereto, is to enable corporations to have the "judicial judgment" of their directors free from any suggestion of bias other than the welfare of the corporation.

CONTRACTS WITH DIRECTORS

The form of cooperative marketing act which has been enacted in many States[91] usually contains the following or similar language relative to directors of associations contracting therewith:

> No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the associations, or to any other kind of contract differing from terms generally current in that district.

By reason of this provision, any contract of the prohibited type entered into by a director with an association which was formed under a statute containing this provision is invalid. The prohibition is primarily against the director. If a contract of the type prohibited is entered into by a director and is carried out, it would seem that he would be liable to account to the association, its receiver, or its members for any profits or gains resulting therefrom.[92] Any other rule would render the prohibition valueless. It is immaterial that the statute prescribes no penalty or imposes no liability.[93] All directors are conclusively charged with knowledge of the law, so that they can not plead ignorance thereof.[94] Even though all of the board of directors of an association, except the contracting director, voted therefor, it would not authorize a prohibited contract, because the directors can not override the statute but must function within its limits.

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[86] Wardell *v.* Railroad Co., 103 U. S. 651.

[87] Mallory *v.* Mallory Wheeler Co., 61 Conn. 131, 23 A. 708, 710.

[88] West *v.* Camden, 135 U. S. 507; see also Timme *v.* Kopmeier, 162 Wis. 571, 156 N. W. 961; L. R. A. 1919, 1114.

[89] Coleman *v.* Hanger, 210 Ky. 309, 275 S. W. 784.

[90] Keely *v.* Black, 90 N. J. Eq. 439, 107 A. 825; Keystone Guard *v.* Beaman, 264, Pa. 397, 107 A. 835; Holland Furniture Co. *v.* Knooihuizen, 197 Mich. 241, 163 N. W. 884.

[91] See sec. 12 of the Bingham Cooperative Marketing Act of Kentucky, p. 121 of appendix.

[92] Rutland Electric Light Co. *v.* Bates, 68 Vt. 579, 35 A. 480; Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962; Wardell *v.* Railroad Co., 103 U. S. 651.

OBLIGATIONS AND LIABILITIES OF DIRECTORS

The board of directors of an association, in directing its affairs, must use care to keep within the powers conferred by its charter and the plan set forth in its by-laws and marketing contract. Directors and officers of an association are simply agents, and if they exceed their authority or violate the charter, by-laws, or marketing contract of the association legal liability results.[95]

The office of the director is no place for a figurehead. The courts refer to directors as trustees, quasi trustees, fiduciaries, and agents. Although directors of an association occupy positions of trust, responsibility, and liability, they are not insurers of the success of the association. They should exercise, however, that degree of care in directing and supervising the affairs of an association that ordinarily prudent and diligent men would exercise under similar circumstances,[96] that is, reasonable care; and a failure to exercise this degree of care or to be honest and diligent in attending to the affairs of an association may render directors liable at common law to the association, to its receiver if in the hands of a receiver, or under some circumstances to members of the association acting in its behalf.

All authorities agree that an association may recover from its directors any losses which it suffers because of their fraud or dishonesty. Gross negligence on the part of directors which permits other directors to defraud an association will render all of them liable.[97] Inattention on the part of a director may render him liable to his association, at least in those instances in which attention to duty should have prevented the loss of a specific amount.[98] Illness or other sufficient cause will excuse failure to attend board meetings.[1]

In addition to the right of an association to compel a director to account for any profits arising out of a prohibited contract, it appears clear that an association, its receiver, or members acting in its behalf would have the right to recover, from the directors who attempted to authorize such a contract, any losses which the association sustained therefrom.[2]

It should be remembered that even in the absence of a statute prohibiting directors from entering into contracts with their associations, the courts scrutinize such contracts jealously, and they may be set aside on slight grounds,[3] even if all the directors of an association, except the one receiving the contract, voted therefor; and if a director acted both for himself and the association, an additional reason for scrutinizing the contract would exist.[4] Such contracts under common-law principles may be set aside at the election of the association unless of advantage thereto and unless fair and reasonable.[5]

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[93] Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962.

[94] Morrison *v.* Farmers' Elevator Co., 319 Ill. 372, 150 N. E. 330.

[95] Fergus Falls Woolen Mills Co. *v.* Boyum, 136 Minn. 411, 162 N. W. 516; McCauley *v.* Arkansas Rice Growers Co-op. Ass'n, —— Ark. ——, 287 S. W. 419.

[96] Briggs *v.* Spaulding, 141 U. S. 132.

[97] McGinnis *v.* Corporation Funding & Finance Co., 8 F. (2d) 532; Coddington *v.* Canady, 157 Ind. 243, 61 N. E. 567.

[98] Bowerman *v.* Hamner, Receiver, 250 U. S. 504; Besseliew *v.* Brown, 177 N. C. 65, 97 S. E. 743, 2 A. L. R. 862.

[1] Briggs *v.* Spaulding, 141 U. S. 132.

[2] Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962; Oakland Bank of Savings *v.* Wilcox, 60 Cal. 126; Citizens Bldg. Ass'n *v.* Coriell, 36 N. J. Eq. 383.

Withheld facts, large profits, suspicious circumstances, or unfavorable terms may furnish an association a basis for setting aside such a contract, but if a contract is made by a director with an association when the association is represented by a majority of the directors, the contract will be upheld if fair and reasonable and if without disadvantage to the association.[6]

The cases are rare, if not nonexistent, in which a director, although inattentive to his duties, has been held liable on account of the general collapse of a corporation, if fraud or specific losses traceable to specific transactions are not involved.[7] Probably this is due in part to the difficulty in showing the amount of the loss suffered in such a case, or that it is chargeable to the neglect of the director. But a director who fails to attend properly to the duties of his office is always confronted by the fact that, generally, he will be held liable for losses due to the fraud of officers, agents, or other directors of the association, or for specific losses such as one caused by the unlawful expenditure or employment of association funds, if he could reasonably have been expected to prevent the losses by attending to his duties.[8] A director is not liable for losses occasioned by the misconduct of codirectors where he is without fault.[9] Directors are not liable for losses due to dishonesty by officers or employees, unless, without using reasonable care, they selected or employed dishonest men or retained them after their dishonesty was known.[10]

If the directors or officers of an association misappropriate its funds or engage in other fraudulent conduct that results in losses thereto, their action can not be condoned; that is, ratified, " except by the unanimous consent of the stockholders (members); otherwise a majority, or a director who might control a majority vote in the corporation, would be able to rob and despoil it with impunity."[11] If it is claimed that the members of an association have ratified transactions of its directors or officers, it must be shown that the members were advised of all the material facts, because without knowledge of such facts there could be no ratification.[12]

Primarily, the right to bring suit against directors for an accounting, or to annul a contract voidable because a director was unlawfully personally interested, is in the corporation, or in its receiver if the corporation is in the hands of a receiver, but members of the corporation may sue the directors under such circumstances, if the directors then in control of the association are themselves the wrongdoers, as it would be folly to expect directors to institute and properly conduct a suit against themselves.[13] The general rule is that no other persons can institute such suits.

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[3] Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587.

[4] Wainwright *v.* P. H. & F. M. Roots Co., 176 Ind. 682, 97 N. E. 8.

[5] Wing *v.* Dillingham et al., 239 F. 54 (petition for writ of certiorari denied), 244 U. S. 654; Geddes et al *v.* Anaconda Copper Mining Co. et al., 254 U. S. 590; Lembeck & Betz Eagle Brewing Co. *v.* McAnarney, 287 F. 927; Stanton *v.* Occidental Life Ins. Co., 81 Mont. 44, 261, P. 620.

[6] Nicholson *v.* Kingery, —— Wyo. ——, 261 P. 122; Stanton *v.* Occidental Life Ins. Co., 81 Mont. 44, 261 P. 620.

[7] Barnes *v.* Andrews, 298 F. 614.

[8] McGinnis *v.* Corporation Funding & Finance Co., 8 F. (2d) 532; Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599, 30 L. R. A. 747.

[9] Fisher *v.* Graves, 80 F. 590.

[10] Bates *v.* Dresser, 251 U. S. 524.

[11] Ford *v.* Ford Roofing Products Co., —— Mo. App. ——, 285 S. W. 538.

[12] Mallory *v.* Mallory Wheeler Co., 61 Conn. 131, 23 A. 708.

Can directors of an association ever be liable personally to third persons? If directors cause or are responsible for the association violating the legal rights of third persons—for instance, by fraud, trespass, coercion, or deceit—they are personally liable to such persons,[14] and the fact that the association may also be liable does not alter the situation. The doctrine is simply an application of the general rule that agents are liable to third persons for any invasion of their legal rights regardless of the liability of their principals. The liability of directors who sign the notes of an association is discussed under the heading of promissory notes.

ADDITIONAL LIABILITIES IMPOSED BY STATUTE

The discussion so far has been based upon the common law, that is, the rule applicable independent of any statute. Now, do the State constitutions and statutes impose liabilities upon directors of cooperative associations in common with other corporate directors? Yes; many, if not all, of the States have provisions in their statutes or constitutions which impose duties and liabilities upon the directors or officers of corporations, or both. Generally speaking, these provisions are applicable to the directors and officers of cooperative associations.

As illustrating the liability under statutes of directors of associations, a case passed upon by the Supreme Court of Montana involving a cooperative association is of interest. In this case the directors of the association were held liable to creditors because they failed to file a report required by a statute of that State, showing the condition of the association.[15]

The constitution of California provides that:

> The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee.

In a case [16] arising under this provision, which was passed upon by the Supreme Court of California, an officer of a corporation was held liable to the trustees in bankruptcy of the corporation because he sold an automobile belonging to him to the corporation, the officer acting in the dual capacity of buyer and seller without disclosing the facts to the corporation.

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[13] Browne *v.* Hammett, 133 S. C. 446, 131 S. E. 612; Morton *v.* Morton Realty Co., —— Idaho ——, 241 P. 1014.

[14] Frontier Milling & Elevator Co. *v.* Roy White Co-op. Mercantile Co., 25 Idaho 478, 138 P. 825; Springman Paper Products Co. *v.* Detroit Ignition Co., 236 Mich. 90, 210 N. W. 222; Scott *v.* Shook, 80 Colo. 40, 249 P. 259; Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

[15] Anderson *v.* Equity Co-op. Ass'n, 67 Mont. 291, 215 P. 802.

[16] Dean *v.* Shingle, 198 Cal. 652, 246 P. 1049.

Section 1622 of the 1924 Code of Iowa reads as follows:

> If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporations knowingly consenting thereto, shall be personally and individually liable to the creditors of such corporation for such excess.[17]

Directors of cooperative associations should ascertain the duties and liabilities imposed upon them by State constitutions and statutes and should govern their actions accordingly. It is not sufficient, ordinarily, simply to examine the cooperative statutes of the State; the general statutes of the State relative to directors should be carefully examined.

EXECUTIVE COMMITTEE

Although the laws generally provide that the business of the association shall be conducted, managed, and controlled by a board of directors, many cooperative associations provide for an executive committee to function with respect to certain aspects of its affairs. The general rule is that the board of directors of a corporation may delegate ministerial matters to an executive committee, but generally it is held that a board of directors may not delegate its own discretionary power.[18]

In a few States it is held that the directors have the power without statutory authority to delegate to officers, agents, or executive committees the power to transact not only ordinary and routine business but business requiring the highest degree of judgment and discretion.[19]

The rule just stated is not the general one. In all States, after the board of directors of an association has determined upon a certain policy or course, they may have such policy or course carried out by an executive committee or by any other means deemed advisable, but generally the initiating of fundamental policies should be done by the board of directors. Many of the cooperative statutes deal expressly with the matter of executive committees, and such statutory provisions should be followed. The general rules pertaining to boards of directors, such as those concerning quorums, apply to executive committees.

MINUTES OF MEETINGS

The minutes of meetings of a board of directors of an association should tell the story of action taken by the board respecting association business. Likewise, the minutes of meetings of members of an association should tell the story of action taken at such meetings by members respecting its affairs. In the absence of charter or statutory provisions it is not necessary that the acts of an association, of its officers, or of its board of directors be evidenced by any writing or record if it would not be necessary to do so in the case of an individual. Although generally, from a strictly legal standpoint, it is not necessary that minutes of meetings of an association or of its board of directors be kept, it is highly important that this be done.

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[17] Parsons et al. *v.* Rinard Grain Co., 186 Iowa 1017, 173 N. W. 276.

[18] Ames *v.* Goldfield Merger Mines Co., 227 F. 292.

[19] Jones *v.* Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 61 Am. St. Rep. 436, 37 L. R. A. 682; Haldeman *v.* Haldeman, 176 Ky. 635, 197 S. W. 376.

If no minutes are made of action of the board of directors, oral testimony is admissible to show the action taken in the event a question with respect thereto should arise in the course of a lawsuit.[20]

The action taken by directors of an association at a meeting of the board of directors should be recorded in the minutes of the board. The action taken by members of an association in the meetings thereof should be recorded in the minutes of the association. The board of directors of an association possess all the corporate powers of the association. The directors of an association should direct and manage its affairs within the scope of the powers conferred by the charter of the association subject to any restrictions contained in its by-laws or marketing contracts. The execution of the orders or the carrying out of the policies fixed by the board of directors is done by the officers and employees thereof. Officers of an association by reason of their offices, or employees by reason of their employment, regardless of their rank, have no authority to bind the association unless such authority has been conferred upon them otherwise than by their election to office or by their employment.

Authority for the action of the officers of an association or its employees should be found in action of the board of directors. In this lies the chief importance of minutes of boards of directors. If no minutes are kept of meetings of a board of directors, oral testimony is admissible to show action taken; on the other hand, if minutes are kept, such minutes are regarded as the best evidence of action taken by the board of directors in the absence of evidence of fraud impeaching the minutes.[21]

All courts, in the absence of fraud impeaching the minutes, regard the minutes at least as prima facie evidence of the action taken by the board of directors.[22]

Before loaning money to an association, banks frequently, if not generally, inquire if the officers have been authorized by the board of directors to borrow money. Frequently a copy of the minutes of the board of directors covering the matter is requested. This is done to see if the board of directors has authorized the proposed action or has imposed any restrictions with reference thereto, for it will be constantly remembered that an association may act only through agents and that persons dealing with an agent act at their peril. If it should turn out that the agent, whether he be president, secretary, or manager, was not authorized to enter into the contract in question on behalf of the association or to engage in any other transaction as its representative, the association is not bound in the absence of estoppel or ratification.[23] On the other hand, if the minutes of a meeting of the board of directors show that the officer was authorized to enter into a certain transaction, such minutes are virtually conclusive on the subject in the absence of fraud, and protect the officer representing the association in the transaction as well as the other party thereto. The failure to record a resolution of a board of directors does not affect its validity.[24]

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[20] Robson *v.* C. E. Fenniman Co., 83 N. J. Law 453, 85 A. 356; Whitlock *v.* Alexander, 160 N. C. 465, 76 S. E. 538; Hughes Mfg. & Lumber Co. *v.* Wilcox, 13 Cal. App. 22, 108 P. 871; Iowa Drug Co. *v.* Souers, 139 Iowa 72, 117 N. W. 300, 19 L. R. A. (N. S.) 115; Traxler *v.* Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914.

[21] German Ins. Co. of Freeport, Ill., *v.* Independent School District of Milford, Dickinson County, Iowa, 80 F. 366; Hawkshaw *v.* Supreme Lodge of Knights of Honor, 29 F. 770.

[22] 14 C. J. 376, 377.

[23] David Stott Flour Mills, Inc., *v.* Saginaw County Farm Bureau, 237 Mich. 657, 213 N. W. 147.

"While a corporation's books and records are evidence to prove its own acts, they are not competent evidence against third persons to prove contracts with them in the absence of proof that they knew and assented thereto." [25]

OFFICERS AND EMPLOYEES

Broadly speaking, all employees and representatives of an association are agents thereof.

Officers of an association are agents [26] and the general rules of agency apply to them. The officers of an association, under the statutes, are usually required to be elected by the directors from among their own number. On the other hand, unless required by law, the charter, or the by-laws, the officers of a corporation need be neither directors nor members nor stockholders thereof.[27]

TERMS AND COMPENSATION

Officers, like directors, barring resignation or expulsion, continue in office after the expiration of the terms for which elected until the election and qualification of their successors, with all of the rights and responsibilities of such officers.[28]

Presumptively, officers, as well as directors, of an association serve without compensation while performing the regular duties of their offices;[29] and generally the officers of an association would be entitled to no compensation for performing the duties of their offices unless provision therefor was made prior to their assuming their duties.

In a North Carolina case, the president of the North Carolina Agricultural Credit Corporation sought to recover compensation for work performed by him as president of the corporation. The court held that he was not entitled to any compensation for the services rendered by him as president, as there was no express contract of employment made prior to the rendition of the services providing for compensation.[30]

Officers, like directors, do not have the power to fix their own salaries, and if salaries or the method of fixing the salaries of officers is not prescribed in the statute or by-laws or by the members they may be fixed, or contracts providing for compensation may be made, generally speaking, only prior to the rendition of services, by a quorum of directors in a board meeting, who are not officers of the association or otherwise disqualified.[31]

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[24] Handley *v.* Stutz, 139 U. S. 417, 35 L. Ed. 227, 11 S. Ct. 530.

[25] Oregon and C. R. Co. *v.* Grubissich, 206 F. 577.

[26] Allen *v.* Cochran, 160 La. 425, 107 So. 292.

[27] Wright *v.* Springfield & New London Railroad Co., 117 Mass. 226, 19 Am. Rep. 412.

[28] Weil *v.* Defenbach, 36 Idaho 37, 208 P. 1025; Stanton *v.* Occidental Life Ins. Co., 81 Mont. 44, 261 P. 620.

[29] First National Bank of Allen *v.* Daugherty, 122 Okl. 47, 250 P. 796; Navco Hardwood Co. *v.* Bass, 214 Ala. 553, 108 So. 452.

[30] North Carolina Agricultural Credit Corporation *v.* Boushall, 193 N. C. 605, 137 S. E. 721; Goodin *v.* Dixie-Portland Cement Co., 79 W. Va. 83, 90 S. E. 544, L. R. A. 1917F. 308; Baltimore & Jamaica Trading Co. *v.* Dinning, 141 Md. 319, 118 A. 801.

[31] Briggs *v.* Gilbert Grocery Co., 116 Ohio 343, 156 N. E. 494; Schaffhauser *v.* Arnholt & Schaefer Brewing Co., 218 Pa. 298, 67 A. 417, 11 Ann. Cas. 772.

POWERS OF OFFICERS

Neither the president nor any other agent of an association has any inherent power by virtue of his office or employment to enter into business transactions,[32] and unless authority to do so is conferred upon officers or other employees it is not possessed by them. For instance, unless specially authorized to do so, an officer of an association could not accept payment of a note calling for payment in money, except by the receipt of money and then only by receiving the full sum due.[33] In this connection, it is said:

> A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws, or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them.[34]

In the case last cited, involving the Saginaw County Farm Bureau, it was held that that organization was not liable for flour ordered in its name by a county agent who had not been authorized by the board of directors to order the flour.

Owing to the foregoing rule, officers of an association, its manager, or any other employee, should be authorized by the board of directors to act before attempting to enter into transactions; and those dealing with an association should ascertain that its representatives are authorized to enter into contracts or transactions of the type in question. If any agent of an association enters into an unauthorized contract, but within the scope of the association's powers, it may be ratified by the association before its repudiation by the opposing party, and it then becomes as binding as though previously authorized.[35]

Notice to officers of matters concerning the association or knowledge by them of facts affecting its interests will generally be deemed to be notice to, or knowledge of, the association, but this is ordinarily not true if the officer is dealing personally with the association.[36]

Officers, generally speaking, may not enter into transactions with an association in which they attempt to act both for themselves and the association. If they do enter into such transactions, they may be repudiated ordinarily by the association. The restrictions applicable to directors dealing with an association apply to officers, and the reader is referred to the section covering directors for information regarding this subject. A corporation, it has been held, can not condone the fraud or wrongdoing of an officer or director except by unanimous consent of the stockholders or members.[37]

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[32] Sterling *v.* Trust Co. of Norfolk, —— Va. ——, 141 S. E. 856.

[33] Stanton *v.* Occidental Life Ins. Co., 81 Mont. 44, 261 P. 620.

[34] Aerial League of America *v.* Aircraft Fireproofing Corporation, 79 N. J. Law 530. 117 A. 704; Peasley *v.* Producers' Market Co., —— Cal. App. ——, 261 P. 733; David Stott Flour Mills, Inc., *v.* Saginaw County Farm Bureau, 237 Mich. 657, 213 N. W. 147.

[35] Stone *v.* Walker, 201 Ala. 130, 77 So. 554. L. R. A. 1918C. 839; Commissioners of Lewes *v.* Breakwater Fisheries Co., 13 Del. Ch. 234, 117 A. 823.

[36] Bartlett *v.* McCallister, 316 Mo. 129, 289 S. W. 814; Knobley Mountain Orchard Co. *v.* Peoples Bank of Keyser, 99 W. Va. 438, 129 S. E. 474.

[37] Ford *v.* Ford Roofing Products Co., —— Mo. App. ——; 285 S. W. 538; see also Tenison *v.* Patton, 95 Tex. 284, 67 S. W. 92.

REMOVAL OF DIRECTORS, OFFICERS, AND AGENTS

Many of the cooperative statutes contain provisions that deal with the matter of removing directors and officers before the expiration of their terms. Associations formed under these statutes should follow these provisions.

At common law the general rule permits the board of directors to remove officers and other agents elected or chosen by them or under their authority without a hearing, although it is advisable to hold a hearing; but the liability on the part of the association on account of such action would depend on whether cause for removal existed.[38] On the other hand, directors and officers elected by the members may be removed by the members before the expiration of their terms, only for cause and after notice and a hearing.[39]

In a case involving a cooperative organization and growing out of the discharge by it of an agent, it was said:[40]

> Even though an agency is for a definite term, the principal has a right to revoke it before the expiration of the term, without incurring liability for damages, because of the agent's failure faithfully to perform his express or implied undertakings as agent.
>
> The default on the part of an agent which will justify the revocation of the contract is not confined to his dealings with the principal. This right of revocation for cause is held to extend to moral delinquencies, which are calculated to affect injuriously the agent's reputation.

LIABILITY FOR WRONGS DONE

If an officer, while acting within the apparent scope of the authority conferred upon him by the association, perpetrates a fraud on an innocent third party or otherwise violates the right of such party, the association is liable, generally speaking, although the officer was really acting for his own benefit.[41]

Officers of an association are liable for wrongs committed by them through the instrumentality of an association, and they may be held liable for any damage which they cause to third persons through the violation of their legal rights.[42]

The statutes of some of the States impose duties and responsibilities on officers of corporations or associations. For instance, in many States officers are required by statute to file certain reports. Investigation should be made to ascertain the duties and responsibilities cast on officers of cooperative associations by the statutes or constitution of the State in which an association is formed, and officers thereof should govern their actions accordingly.

MEETINGS OF ASSOCIATIONS

Many of the statutes under which cooperative associations are formed contain provisions with respect to the holding of meetings. Frequently such statutes require that a meeting be held annually while permitting the holding of special meetings at any time. These statutory provisions should be followed. In the absence of a controlling provision in the statute or charter on the subject an association may adopt by-laws covering and governing the calling of meetings; and of course in any case the subject may be covered in by-laws that are consistent with the statute under which the association is formed and with its charter.

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[38] Brindley *v.* Walker, 221 Pa. 287, 70 A. 794, 23 L. R. A. (N. S.) 1293; 14 A. C. J. 74.

[39] Alliance Co-op. Ins. Co. *v.* Gasche, 93 Kan. 147, 142 P. 882; Brindley *v.* Walker, 221 Pa. 287, 70 A. 794, 23 L. R. A. (N. S.) 1293; 14 A. C. J. 74.

[40] Coates *v.* Eastern States Farmers' Exchange, 99 Vt. 170, 130 A. 709.

[41] Engen *v.* Merchants & Mfrs'. State Bank, 164 Minn. 293, 204 N. W. 963.

[42] Scott *v.* Shook, 80 Colo. 40, 249 P. 259; Springman Paper Products Co. *v.* Detroit Ignition Co., 236 Mich. 90, 210 N. W. 222; Tyler *v.* Savage, 143 U. S. 79, 12 S. Ct. 340; Jamestown Iron & Metal Co., Inc., *v.* Knofsky, 291 Pa. 60, 139 A. 611.

Unless a statute specifies how notices of meetings shall be given the by-laws may state the method to be followed, such as by publication in certain newspapers or by mailing of notices a certain number of days prior to the meeting. "It is not within the province of the courts to declare any form of notice of a shareholders' meeting insufficient, if it complies with the charter and by-laws of the corporation, unless there is some specific statutory provision to the contrary."[43]

Generally speaking, a by-law providing for the giving of notices of meetings by mail should be so worded that the effectiveness of the notice will depend on its mailing rather than on its receipt.

With respect to the general conduct of meetings the fundamental rule is that the majority controls.[44] A presiding officer, for instance, who refuses to allow the majority to express its will may be removed and another chosen in his stead.

Reasonable election rules could be set forth in the by-laws of an association; and if the by-laws authorize its directors to determine the election rules, a rule adopted by the directors that if a man votes twice, only the ballot first cast shall be counted is valid.[45]

QUORUM

An association may adopt by-laws dealing with the procedure to be followed in the conduct of meetings and specifying the number of members required for a quorum. When the by-laws specify the number of members necessary to constitute a quorum a valid meeting can not be held unless the number of members specified is present at the time each proposition is voted upon.[46]

If the law of the State in which an association is formed specifies the number of members that must attend a meeting in order that there may be a quorum, this is controlling, and a by-law in conflict therewith is void.[47]

At common law and in the absence of a statutory, charter, or by-law provision changing the rule, the members who attend a meeting of an association constitute a quorum for the conduct of business. In other words, at common law those who come constitute a valid meeting for the transaction of business.[48]

If the by-laws require, say, a two-thirds vote of members present to carry a proposition, members present but not voting can not be counted as voting for either side.[49]

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[43] Citrus Growers' Dev. Ass'n *v.* Salt River V. W. Users' Ass'n, —— Ariz. ——, 268 P. 773.

[44] American Aberdeen-Angus Breeders' Ass'n *v.* Fullerton, 325 Ill. 323; 156 N. E. 314.

[45] Davis *v.* S. C. Cotton Growers' Co-op. Ass'n, 127 S. C. 353, 121 S. E. 260.

[46] Everts et al. *v.* Kansas Wheat Growers' Ass'n et al., 119 Kan. 276, 237 P. 1030; Beale *v.* Columbia Securities Co., 256 Mass. 326, 152 N. E. 703.

[47] Gentry-Futch Co. *v.* Gentry, 90 Fla. 595, 106 So. 473.

[48] Morrill *v.* Little Falls Manufacturing Co., 53 Minn. 371; Alliance Co-op. Ins. Co. *v.* Gasche, 93 Kan. 147, 142 P. 882; Gilchrist *v.* Collopy, 119 Ky. 110, 82 S. W. 1018.

[49] James R. Kirby Post No. 50 *v.* American Legion, 258 Mass. 434, 155 N. E. 462.

VOTING UNIT

At common law a stockholder or member of an association has but one vote on questions coming before meetings of stockholders or members irrespective of the number of shares held by him.[50] In a case decided by the Supreme Court of the United States it was said:

> Usually a stockholder is a member of the company and as such has a right to vote, but it does not necessarily follow that the right increases with the increase in stock, or that the right is lessened in case the number of shares owned by the stockholder should be diminished.[51]

Statutes providing for the formation of cooperative associations in many cases specify that members shall be entitled to only one vote on any question affecting the association. Unless each share of stock is given a vote by statute, those interested in forming an association may, if the incorporation statute authorizes, include a suitable provision in the articles of incorporation establishing what the voting unit at meetings of the stockholders shall be. Unless in conflict with the law of the State or with a provision in its charter the members of an association could adopt a by-law establishing what the voting unit at meetings of the association would be.[52]

If there is a statutory or charter provision dealing with the matter it controls; a by-law, to be valid, must be in harmony therewith. In case there is no statutory, charter, or by-law provision on the subject, the common-law rule prevails of one vote for each member or stockholder without regard to the number of shares he may own. With respect to nonstock associations or corporations, this rule also prevails unless changed in one of the ways indicated. It is interesting that the generally accepted cooperative principle of one man, one vote, is merely an application of the common-law rule on the subject. It has been said that "There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on the voting power,"[53] provided they do not violate any statutory or constitutional provisions.

PROXY VOTING

At common law every vote must be personally cast, and there is no right to vote by proxy.[54] Many of the cooperative statutes prohibit voting by proxies. When proxy voting is permitted, it is not essential that the person to whom a proxy is given be himself a member or stockholder in the absence of a statute or by-law requiring it.[55] Many of the cooperative statutes under which cooperative associations are formed permit of the establishment of the delegate system of representation at meetings of the association. Unless prohibited by statute, any nonprofit association would apparently be free to establish the delegate system of voting at its meetings.[56]

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[50] Taylor *v.* Griswold, 14 N. J. Law 222, 27 Am. Dec. 33; Simon Borg & Co. *v.* New Orleans City R. Co., 244 F. 617; Matter of Rochester Dist. Tel. Co. (N. Y.), 40 Hun, 172; 7 R. C. L. 339.

[51] Bailey *v.* Railroad Co., 89 U. S. 604, 635.

[52] Detwiler *v.* Commonwealth ex rel. Dickinson, 131 Pa. 614, 7 L. R. A. 357.

[53] State ex rel. Frank *v.* Swanger, 190 Mo. 561, 89 S. W. 872, 2 L. R. A. (N. S.) 121; Orme *v.* Salt River Valley Water Users' Ass'n, 25 Ariz. 324, 217 P. 935.

[54] Perry *v.* Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 So. 217; 14 C. J. 907.

[55] Gentry-Futch Co. *v.* Gentry, 90 Fla. 595, 106 So. 473.

[56] People ex rel. Hoyne *v.* Grant, 283 Ill, 391, 119 N. E. 344; Orme *v.* Salt River Valley Water Users' Ass'n, 25 Ariz. 324, 217 P. 935.

BANKRUPTCIES—RECEIVERSHIPS

A cooperative association may not be thrown into involuntary bankruptcy because the bankruptcy statute, so far as involuntary bankruptcies are concerned, applies only to "moneyed, business, or commercial corporations."[57]

If cause therefor exists, a receiver may be appointed for a cooperative association. Insolvency—that is, inability to meet the demands of creditors—generally speaking, is one of the most common causes for the appointment of a receiver. In an Arkansas case[58] the court refused to appoint a receiver because of breaches of the marketing contract by the officers of the association, and refused to release the members involved from their contracts on account of such breaches. The court pointed out that "the rule is not to appoint a receiver when the specified acts complained of may be remedied by injunction or are capable of redress by other available means."

The function of a receiver is to collect the assets and apply them on the debts of the concern involved. For instance, if an association had overpaid a member and a receiver was appointed for the association, the receiver could sue the member and collect the amount of the excess payment.[59]

A receivership does not terminate or dissolve an association. It simply substitutes the management of the receivers for the management of the officers and directors of the association for the life of the receivership.[60]

MARKETING CONTRACTS

A contract has been defined as an agreement between competent parties, upon sufficient consideration, to do or not to do a particular lawful thing.[61] In order to be binding and enforceable a contract must possess mutuality; that is, both parties must be bound, or neither will be. For instance, if one party agrees to sell a certain article, the other must agree to buy, or the agreement is void.[62]

A contract or agreement by which a member of a cooperative association appoints the association his agent for the sale and marketing of his product, to be valid should also contain a provision in which the association agrees to act as such agent and do the work in question. The question of whether cooperative marketing contracts possess mutuality has been before the courts in many cases. The courts, without exception, have held that marketing contracts possessed mutuality.[63]

Inasmuch as marketing contracts universally require the association to do certain things, while obligating the members to do certain other things, the mutuality of such contracts would appear to be beyond question.

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[57] In re Dairy Marketing Ass'n of Ft. Wayne, Inc., 8 F. (2d) 626.

[58] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419.

[59] Cunningham *v.* Long (Maine Potato Growers' Exchange), —— Me. —— 135.A, 198.

[60] Gaboury *v.* Central Vermont Ry. Co., 250 N. Y. 233, 165 N. E. 275.

[61] Blackstone's Commentaries, v. 1, Book II, p. 442.

[62] American Cotton Oil Co. *v.* Kirk, 68 F. 791; Willard, Sutherland & Co. *v.* United States. 262 U. S. 489.

[63] Warren *v.* Alabama Farm Bureau Cotton Ass'n, 213 Ala. 61, 104 So. 264; Rifle Potato Growers Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937; Milk Producers' Marketing Co. *v.* Bell, 234 Ill. App. 222; Burley Tobacco Growers' Co-op. Ass'n *v.* Rogers. —— Ind. App. ——, 150 N. E. 384; Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n *v.* Clark, 160 La. 294, 107 So. 115; Minnesota Wheat Growers' Co-op. Marketing Ass'n *v.* Huggins, 162 Minn. 471, 203 N. W. 420; Oregon Growers Co-op. Ass'n *v.* Riddle, 116 Or. 562, 241 P. 1011; Dark Tobacco Growers' Co-op. Ass'n *v.* Mason, 150 Tenn. 228, 263 S. W. 60.

The Supreme Court of Wisconsin has held that the language of the cooperative marketing act of that State is such that the marketing contracts of associations formed under it need not possess mutuality.[64]

A contract should be in writing and signed by both parties. It should clearly and fully set forth the rights, duties, and obligations of each of the parties. Particular care should be taken to make certain that the contract is clear upon every point involved. For when parties to a contract have apparently set forth in writing the understanding between them with reference to the matter involved, it is presumed to represent the entire agreement of the parties thereto, and ordinarily it can not be successfully disputed by oral evidence.[65]

Subject to restrictions contained in the statute under which the association is formed or in its charter, an association has a wide latitude with respect to the provisions which it may include in its marketing contract. It may provide for any plan or device that is not contrary to law. For instance, an association could provide in its contract that it should have the right to enter into contracts with producers different from the one in question. If an association is entering into a long-term contract with members, it is advisable to include therein a provision permitting the association to enter into contracts in the future with other producers different from the instant one. By this means, new contracts may be made which embody improvements and changes deemed desirable without the necessity of "signing up" the producers who sign the original contract, but the old members should be given an opportunity of signing the new contracts if they wish to do so, and the provision in the old contract authorizing the making of contracts different from the original one should specify that producers who have signed the same on request may sign the new contract.

Long before the advent of cooperative marketing, the courts enforced crop contracts under which the seller agreed to deliver to the buyer the crop to be grown on his farm or on certain land[66] so that aside from the cooperative feature there is nothing inherently new in the idea of a producer entering into such a contract.

WHEN MAY COOPERATIVE MARKETING CONTRACTS BE MADE?

How early in the formation of a cooperative association may producers enter into marketing contracts on account thereof? Prior to the actual incorporation of an association may producers make valid marketing contracts with it? According to the weight of authority, producers may sign marketing contracts which constitute an offer to contract with the proposed cooperative before its incorporation, and on the acceptance of this offer by the cooperative after its incorporation a binding contract results.[67]

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[64] Watertown Milk Producers' Co-op. Ass'n *v.* Van Camp Packing Co., —— Wis. ——, 225 N. W. 209.

[65] Dark Tobacco Growers' Co-op. Ass'n *v.* Mason, 150 Tenn. 228, 263 S. W. 60; Elmore *v.* Maryland & Virginia Milk Producers' Ass'n, Inc., 145 Va. 42, 132 S. E. 521, 134 S. E. 472.

[66] Briggs *v.* United States, 143 U. S. 346; Butt *v.* Ellett, 19 Wall. 544; Dickey *v.* Waldo, 97 Mich. 255, 56 N. W. 608, 23 A. L. R. 449.

A producer could withdraw his offer to contract prior to its acceptance and thus prevent a binding obligation from coming into existence, unless the language of the contract shows that each producer signs because others have done so and for the purpose of inducing others to sign contracts. But if the language of the contract is framed along the lines indicated or contains language showing that each producer receives some consideration for keeping his offer to contract open, then according to the weight of authority the offer may not lawfully be withdrawn.[68] Of course, after an association is incorporated it may freely contract.

KINDS OF COOPERATIVE MARKETING CONTRACTS

What kind of marketing contracts may producers make with their cooperatives? Any kind that is consistent with law, but, to be more specific, the contract may be of the purchase-and-sale type or of the agency type if the statute under which the association is formed authorizes either or both types. If the statute is silent as to the type of contract that may be adopted, then it would appear that an association could adopt either type.

Many of the cooperative statutes expressly authorize purchase-and-sale as well as agency contracts. Under either type of contract, the obligation of the cooperative, generally speaking, is the same, namely, to return the sale price of the producers' products on the basis prescribed in the contract, less authorized deductions. In the case of purchase-and-sale contracts, the purchase price is the resale price, less authorized deductions. The fact that a specific purchase price is not named in the contract is immaterial because that is definite that can be made definite.[69] In commercial contracts title passes although the amount to be paid for the goods in question may depend on the resale price received for them.[70] "Under ordinary conditions, a valid agreement can be made for purchase and sale without the fixing of a specific price."[71] Moreover, where a statute authorizes a purchase-and-sale contract, this resolves all doubt as to the passing of title as it is certainly competent for the legislature to prescribe the conditions which shall be sufficient to pass title to products.

In a certain case it was said:

> We are dealing here with a special form of statutory contract whose nature and legal effect are defined and determined by the act under which the contract has been made between the parties. It is clear, therefore, that such agreement need not conform to the essentials of an ordinary contract of sale as to the certainty of the price.[72]

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[67] Hart Potato Growers' Ass'n *v.* Greiner, 236 Mich. 638, 211 N. W. 45; Washington Wheat Growers' Ass'n *v.* Leifer, 132 Wash. 602, 232 P. 339; Burley Tobacco Growers Co-op. Ass'n *v.* Rogers, —— Ind. ——, 150 N. E. 384; Jefferson County Farm Bureau *v.* Stewart, 235 Ill. App. 370; Texas Farm Bureau Cotton Ass'n *v.* Lennox (Tex. Civ. App.), 257 S. W. 935; 14 C. J. 257, 17 R. C. L. 81.

[68] Collins *v.* Morgan Grain Co., 16 F. (2d) 253; Coleman Hotel Co. v. Crawford (Tex. Civ. App.), 290 S. W. 810.

[69] Texas Farm Bureau Cotton Ass'n *v.* Stovall, 113 Tex. 273, 253 S. W. 1101; Brown *v.* Georgia Cotton Growers' Co-op. Ass'n, 164 Ga. 712, 139 S. E. 417.

[70] Balch *v.* Ashton, 54 Iowa 123, 6 N. W. 3 Iowa 112 (146).

[71] United States *v.* Swift & Co., and Swift & Co. *v.* United States, —— U. S. ——, 46 S. Ct. 308.

[72] Louisiana Farm Bureau C. G. Co-op. Ass'n *v.* Clark, 160 La. 294, 107 So. 115; Texas Farm Bureau Cotton Ass'n *v.* Stovall, 113 Tex. 273, 253 S. W. 1101; Brown *v.* Georgia Cotton Growers' Co-op. Ass'n, 164 Ga. 712, 139 S. E. 417; Watertown Milk Producers' Co-op. Ass'n *v.* Van Camp Packing Co., —— Wis. ——, 225 N. W. 209.

Just as a State may prescribe what shall constitute a deed which shall be sufficient to pass title to land, it has the power to declare what shall be sufficient to pass title to farm products. At common law independent of statute, if a cooperative association employs a purchase-and-sale contract it should be held to pass title to the products to the association. In such contracts the parties agree and declare that the association buys and that the member sells. In the forms of such contracts generally employed there are no provisions inconsistent with the passing of title. Therefore the clear declaration of the parties with respect thereto should be given effect. It is universally held that the intention of the parties is the dominant consideration in determining if title passes under a given instrument.[73] No better evidence of the intention of the parties could be had than their clear statement that the one sells and the other buys the products involved. The courts in numerous cases in which the contracts involved contained statements consistent with both sale and agency have held that title to the goods in question passes.[74]

In the purchase-and-sale contract there may be certain practical advantages in that it should be easier ordinarily to negotiate a loan on products to which the borrower has title, in that the right thus to borrow money would be apparent; but if an agency contract authorizes an association to borrow money on products received under it, the right of an association to do so is clear. As is well known, the stocks and bonds purchased by brokers for their customers that are carried on margin constitute a substantial part of their business. These brokers do not take title to the stocks; title to them is in the purchasers.[75] Brokers daily borrow immense sums of money from banks on stocks and bonds thus held by them. The authority of the broker to borrow money on such stocks comes from the fact that the customer has authorized him to do so. In buying from a cooperative, there will probably be those who prefer to buy from one who has title rather than from one who acts as agent. In one case the cautious buyer would seek to learn if the association had "good title" to the products it was offering for sale, and in the other case the cautious buyer would seek to learn if the association was authorized to sell the products.

So far as enforcement is concerned, the cooperative acts[76] generally authorize associations formed under them, whether employing an agency or a purchase-and-sale contract, to provide for liquidated damages and they are also given the remedies of injunction and specific performance to compel members to deliver their products to an association. The courts enforce agency[77] and purchase and sale[78] contracts without discrimination.

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[73] 23 R. C. L. 1216.

[74] Ferry & Co. *v.* Hall, 188 Ala. 178, 66 So. 104, L. R. A. 1917B 620; Mishawaka Woolen Mfg. Co. *v.* Westveer, 191 F. 465.

[75] Richardson, Trustee in Bankruptcy, *v.* Shaw, 209 U. S. 365; Duel *v.* Hollins, and Wiener, Levy & Co. *v.* Hollins, 241 U. S. 523.

[76] See sec. 17 of Bingham Cooperative Marketing Act of Kentucky on p. 123 of appendix.

[77] Elephant Butte Alfalfa Ass'n *v.* Rouault, —— N. M. ——, 262 P. 185; Oregon Growers' Co-op. Ass'n *v.* Lentz, 107 Or. 561, 212 P. 811; Elmore *v.* Maryland & Virginia Milk Producers' Ass'n, 145 Va. 42, 134 S. E. 472.

[78] Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kan. 672, 216 P. 311; Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; Texas Farm Bureau Cotton Ass'n *v.* Stovall, 113 Tex. 273, 253 S. W. 1101.

When an association is authorized to borrow money on products received from members, persons taking a lien on products after their delivery to an association as security for a loan made to it are as safe under an agency[79] as under a purchase-and-sale contract, because superior liens in either case acquired prior to delivery of the products would take precedence over those subsequently acquired; and any action affecting the products taken after the delivery of the products and after the granting of liens by the association would have to respect the liens given by the association and conform to them.

In the event an association that used a purchase-and-sale contract failed, having on hand products or the money derived from the sale of them, a question would arise whether the members under such contracts were merely common creditors along with other unsecured creditors or whether they were preferred creditors. Apparently they would be common creditors, as this is the general rule in analogous situations in which title to goods that have not been paid for has passed.[80] Again, when title to the products passes to an association, as is the case under the purchase-and-sale form, a creditor of the association after obtaining a judgment could seize a sufficient quantity of the products to satisfy his judgment.[81]

On the other hand, if an association operates with an agency marketing contract, members would not be common creditors in the event of failure of the association. On the contrary, they would be entitled to receive full returns in accordance with their contracts or the return of their products, although to do so might leave creditors of the association unpaid. Any other rule would mean that the property to which the members had title could be taken to satisfy debts of the association, and it is to be remembered that an association is an entity separate and apart from its members. Again the fundamental rule is that property in the hands of an agent for the purpose of sale may not be seized by creditors of the agent to satisfy claims they have against him.

If the papers defining the relationship between an association and its members do not state the capacity in which the association receives and markets their products but simply provide for the marketing of their products by the association, the relationship is one of agency, and title to the products does not pass to the association.[82]

In a Maine case[83] in which the marketing contract did not specify whether it was a purchase-and-sale or an agency contract, a member's fruit froze after gathering but before delivery to the association. The court held that the contract was an agency contract and that the loss fell entirely on the grower. In a purchase-and-sale contract a provision could be included placing the risk incident to the deterioration and loss of the crop on the member even after title to it had passed to the association.

WHEN MARKETING CONTRACTS BECOME EFFECTIVE

Marketing contracts frequently contain a provision that they will not become effective until a certain acreage or number of contracts have been obtained. The power of deciding when the conditions in question exist is usually left with the board of directors or a special committee appointed for the purpose. Such a provision is valid, and the decision made with respect to it is binding unless fraud or bad faith is established by the persons challenging the correctness of the decision.[84] If the data submitted to the board of directors or the executive committee that was vested with authority to make the decision in question were false, and known to be false by those submitting them, then the decision based thereon may be upset even though the board or committee acted in good faith.[85]

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[79] Phez Co. *v.* Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970, 25 A. L. R. 1090.

[80] McKenzie *v.* Roper Wholesale Grocery Co., 9 Ga. App. 185, 70 S. E. 981.

[81] McKenzie *v.* Roper Wholesale Grocery Co., 9 Ga. App. 185, 70 S. E. 981.

[82] Haarparinne *v.* Butter Hill Fruit Growers Ass'n, 122 Me. 138, 119 A. 116.

[83] Haarparinne *v.* Butter Hill Fruit Growers Ass'n, 122 Me. 138, 119 A. 116.

If the contract specifies that a notice advising that the required "sign-up" has been effected will be mailed to each producer signing the contract and the notice is not mailed the contract is not effective[86] unless waived.[87]

A contract could specify that public notice shall be given when the required "sign-up" is effected, and then notice could be given in the public press of the district.

Ordinarily it would appear preferable to have the contract so drawn that it is effective and binding from the signing thereof but subject to cancellation in the event the required "sign-up" is not effected by a certain time. In this way questions regarding the status of the contract prior to the giving of the notice that the necessary "sign-up" has been obtained are eliminated.

DURATION OF MARKETING CONTRACTS

For what period of time may a cooperative marketing contract be entered into? Many cooperative statutes[88] prescribe the maximum number of years, frequently 10, that may be covered in a contract, and if the statute under which an association is formed contains such a provision it should be observed. If there is no restrictive provision on the subject in the law of the State or the charter of the association, then an association and its members are free to enter into marketing contracts for any period that may be agreed upon.

Provisions may be inserted in marketing contracts (unless the length of time that a contract may run is restricted by law or the charter of the association) providing that the contract shall continue unless canceled on or before a certain date. Such cancellation clauses are usually referred to as withdrawal provisions.

A withdrawal provision affects only the length of time that the contract may run. It does not affect the binding character of the contract. Unless the conditions of a withdrawal provision are met.

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[84] Lennox *v.* Texas Farm Bureau Cotton Ass'n (Tex. Civ. App.), 16 S. W. (2d) 413; Rowland *v.* Burley Tobacco Growers' Ass'n, 208 Ky. 300, 270 S. W. 784; Washington Wheat Growers' Ass'n *v.* Leifer, 132 Wash. 602, 232 P. 339; Pittman *v.* Tobacco Growers' Co-op. Ass'n, 187 N. C. 340, 121 S. E. 634; Poultry Producers of Central California *v.* Nilsson, 197 Cal. 245, 239 P. 1086; Martinsburg & Potomac R. R. Co. *v.* March, 114 U. S. 549; New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Berger Manufacturing Co. *v.* Huggins, 242 F. 853; Bower-Venus Grain Co. *v.* Norman Milling & Grain Co., 86 Okl. 152, 207 P. 297; Gratiot St. Warehouse Co. *v.* Wilkinson et al., 94 Mo. App. 528, 68 S. W. 581; Hayes Grain & Commission Co. *v.* Federal Grain Co., 169 Ark. 1072, 277 S. W. 521. The principle involved is applicable to any matter or thing.

[85] Northwest Hay Ass'n *v.* Chase, 136 Wash. 160, 239 P. 1; Wenatchee Dist. Co-op. Ass'n *v.* Mohler, 135 Wash. 169, 237 P. 300.

[86] Idaho Grimm Alfalfa Seed Growers' Ass'n *v.* Stroschein, 42 Idaho 12, 242 P. 444, 47 A. L. R. 916.

[87] Wenatchee Dist. Co-op. Ass'n *v.* Thompson, et al., 143 Wash. 657, 255 P. 918.

[88] See sec. 17 of Bingham Cooperative Marketing Act of Kentucky on p. 123 of appendix.

the cancellation of the contract concerned is not effected. In other words, there is no withdrawal unless conditions relative thereto are complied with. For instance, if a withdrawal provision permits a member to withdraw by giving 30 days' notice prior to a certain date, a notice is void that fails to give the full 30 days, and the attempt to withdraw fails.[89]

SIGNING MARKETING CONTRACTS

Even though a contract is signed without being read by persons capable of reading it, and although the claim is made that its contents were misrepresented, it is valid and enforcible if signed under normal conditions.[90] The law proceeds upon the theory that a person must use some care and caution to protect himself and that he can not complain of situations made possible by his own carelessness.

If the signer of a contract is illiterate and the contract is misrepresented to him it may be rescinded.[91] If a contract is signed with the understanding that it is not to become effective until the happening of a certain event, such as obtaining the approval of a third person, the contract fails if the approval is not obtained,[92] or if the delivery of the contract was conditional and the grower was to have an opportunity of reading it before the contract became effective, it fails if this opportunity is not given.[93] Close questions of fact may arise under circumstances like these, and in a Virginia case the court refused to believe testimony that the contract had been conditionally delivered and hence held it binding.[94]

A wife or husband is not by virtue of the marriage relationship alone the agent of the other to sign a marketing contract;[95] but if either had been given or had been represented by the other as having authority to market the crops grown, a marketing contract signed by the husband or the wife, as the case may be, would be binding on the other.[96]

CONTRACTS OBTAINED BY FORCE OR FRAUD

If solicitors, in seeking to get producers to sign contracts, make statements which are material and false relating to the affairs of the association, contracts thus obtained could be set aside by the producers in suits promptly brought for this purpose, or if such producers gave notice promptly to the association after discovery of the fraud that they regarded the contracts as invalid because of fraud and then refused to recognize them in any way, they could defend suits brought against them by the association for failure to abide by the contracts by showing fraud in their procurement;[97] and probably in some jurisdictions, although no notice of the fraud was given by the producers to the association, they could defend suits brought against them by the association by showing fraud in the procurement of the contracts.

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[89] Grays Harbor Dairymen's Ass'n *v.* Engen, 130 Wash. 169, 226 P. 496; Egyptian Seed Growers' Exchange *v.* Hollinger, 238 Ill. App. 178.

[90] Pittman *v.* Tobacco Growers Co-op. Ass'n, 187 N. C. 340, 121 S. E. 634; Tobacco Growers' Co-op. Ass'n *v.* Chilton, 190 N. C. 602, 130 S. E. 312; Barron G. Collier, Inc., *v.* Stebbins, 236 Mich. 147, 210 N. W. 264.

[91] Dunbar *v.* Tobacco Growers' Co-op. Ass'n, 190 N. C. 608, 130 S. E. 505.

[92] Tobacco Growers' Co-op. Ass'n *v.* Battle, 187 N. C. 260, 121 S. E. 629.

[93] Georgia Cotton Growers Co-op. Ass'n *v.* Smith, 163 Ga. 761, 137 S. E. 233.

[94] Elmore *v.* Maryland & Virginia Milk Producers' Ass'n, 145 Va. 42, 132 S. E. 521.

[95] Waken *v.* Davis, 112 Okl. 23, 239 P. 659; Sladkin *v.* Ruby, —— N. J. ——, 135 A. 880.

[96] Dark Tobacco Growers' Co-op. Ass'n *v.* Garth, 218, Ky. 391, 291 S. W. 367.

[97] Kansas Wheat Growers' Ass'n *v.* Massey, 123 Kan. 183, 253 P. 1093; Kansas Wheat Growers' Ass'n *v.* Rowan, 123 Kan. 169, 254 P. 326; Burley Tobacco Growers' Co-op. Ass'n *v.* Rogers, —— Ind. App. ——, 150 N. E. 384.

If duress, force, or intimidation is used to obtain a contract, the producer concerned may have it set aside or may defend when sued thereon, by showing the facts under which it was obtained.[98]

Although force or fraud is involved in the procurement of a contract, if the producer recognizes the contract in any way after discovery of the fraud or the cessation of the force such as by making deliveries under it, or if he executes a proxy, thus asserting that he is a member of the association, when membership, if it exists, is by reason of the marketing contract or as a part thereof, or if by any other act a producer recognizes the contract although procured by force or fraud, as binding, he will be deemed to have waived the force or fraud, as the case may be, and the contract may be enforced against him.[99]

In order for statements made by solicitors or others in the procurement of contracts to amount to such fraud or misrepresentations as would authorize a rescission of a contract, the statements made must relate either to past or to present conditions or to situations affecting the association, because a prophecy made or opinion expressed as to the things that will be accomplished by the association are all matters in the realm of conjecture, and whether they will or will not come to pass is known by all concerned to be uncertain.[1] A limitation on the foregoing doctrine existing in some jurisdictions is that the party making the prophecies or expressing the opinions concerning matters to transpire in the future must honestly believe them.[2]

If the person to whom false statements are made to induce him to sign a contract, knows that the statements are false, he can not rescind the contract because of them.[3] Oral statements or agreements made prior to the signing of a marketing contract regarding matters covered therein are merged in the written contract, and although inconsistent with the terms of the contract they may not be used for upsetting the contract.[4]

WHEN TITLE TO PRODUCTS PASSES TO ASSOCIATION

If a cooperative association is using a purchase-and-sale contract, when does title to the products covered by the contract pass to the association? May an association take title to the fruit, grain, wool, or other agricultural product covered by its marketing contract prior to the time that the producer delivers the product to the association? The parties to a contract are free to include therein any terms they wish with respect to the passing of title and the rights and responsibilities of the respective parties with respect to the products involved. For instance, a contract could provide that the title to products passes to the association before delivery of them, but that the risks incident to their holding, handling, and delivery are on the producer.[5]

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[98] Sun-Maid Raisin Growers of California *v.* Papazian, 74 Cal. App. 231, 240 P. 47; Commonwealth [Burley Tobacco Society] *v.* Reffitt, 149 Ky. 300, 148 S. W. 48, 42 L. R. A. (N. S.), 329.

[99] Kansas Wheat Growers' Ass'n *v.* Massey, 123 Kans. 183, 253 P. 1093; Kansas Wheat Growers' Ass'n *v.* Rowan, 123 Kan. 169, 254 P. 326.

[1] South Carolina Cotton Growers' Co-op. Ass'n *v.* English, 135 S. C. 19, 133 S. E. 542; Burley Tobacco Growers' Co-op. Ass'n *v.* Rogers, —— Ind. ——, 150 N. E. 384.

[2] Texas Farm Bureau Cotton Ass'n *v.* Craddock (Tex. Civ. App.), 285 S. W. 949.

[3] Simpson *v.* Tobacco Growers' Co-op. Ass'n, 190 N. C. 603, 130 S. E. 507.

[4] Burley Tobacco Growers' Co-op. Ass'n *v.* Rogers, —— Ind. ——, 150 N. E. 384.

As between the parties to a marketing contract there is apparently no question but that the contract could be so drawn as to pass title to the association before the producer has delivered the products.[6] Many cooperative statutes expressly authorize the making of marketing contracts that pass title to the products involved prior to their delivery to associations formed under them. In many cooperative statutes language reading substantially as follows appears: "If they (members) contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; *or at any other specified time if expressly and definitely agreed in the said contract.*"[7] The language last quoted expressly authorizes the making of marketing contracts that pass title to products prior to their delivery to an association. Obviously, a "purchase" of products after their sale to an association is not a recorded lien.

In order to have the marketing contract pass title to the products covered by it, prior to the time that the products are delivered to the association, the marketing contract should so read as to make plain that it is a contract of sale rather than a contract to sell. If the marketing contract reads that the producer agrees to sell and the association agrees to buy, then this language, standing alone, is generally construed as importing an executory contract as distinguished from an executed contract. In a North Carolina case, the court passed upon a marketing contract which read "The association agrees to buy and the grower agrees to sell and deliver" the tobacco in question, and the court held that this was a contract to sell rather than a contract of sale.[8]

Assuming that a marketing contract is a contract of sale and one under which the title passes prior to the time that the products are delivered to the association, does the association concerned receive such a title to the products that any dealer or other person "buying" the products after the making of the marketing contract does not get title to them? Or if the products are seized by a creditor of the producer, or if a person takes a chattel mortgage on them after the making of the marketing contract, are the rights of the association to the products superior to their rights in or to them? In a majority of the States an association concerned in a situation like any of those described would apparently have title to the products so that the association could recover damages (or the products) from any dealer who attempted to purchase them or from any person who attempted to attach or seize the products as the products of the producer or from any person who was seeking to enforce a chattel mortgage on the products taken after their sale to the association.

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[5] The Elgee Cotton Cases, 89 U. S. 180; Filiatreau *v.* United States, 14 F. (2d) 659.

[6] Sun-Maid Raisin Growers of California *v.* Jones, —— Cal. App. ——, 274 P. 557; Texas Hay Ass'n *v.* Angleton State Bank (Tex. Com. App.), 291 S. W. 846, reversing decision in 285 S. W. 941; Beardsley *v.* Beardsley, 138 U. S. 262; 24 R. C. L. sec. 312.

[7] See sec. 17 of Bingham Cooperative Marketing Act of Ky. on p. 123 of appendix.

[8] Tobacco Growers' Co-op. Ass'n *v.* L. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545, 47 A. L. R. 928.

In a California case,[9] raisins grown by a producer who had entered into a marketing contract with the Sun-Maid Raisin Growers of California were seized by the sheriff while they were in sweat boxes and before their delivery to the association, to satisfy a judgment which had been obtained by a creditor against the grower of the raisins. The Sun-Maid Raisin Growers of California then brought suit against the sheriff for the recovery of the raisins. The court held that title to the raisins was in the association at the time the sheriff seized them, and hence that the raisins could not be used to satisfy the claim which the creditor had against the grower. In determining that title had passed, the court emphasized the fact that the contract provided:

> That the buyer (Sun-Maid Raisin Growers, a corporation) does hereby purchase and the seller (Betel) does hereby sell all of the raisin grapes to be produced during the years 1923 to 1937, inclusive. * * * This instrument is intended by the parties to pass to and vest in the buyer a present title and right of possession to all of the crops of raisin grapes covered hereby. The buyer shall at all times have the right to enter upon said premises and remove the said crops therefrom; but the right of the buyer to so enter and remove said crops shall not affect the obligation of the seller to pick, cure and deliver the same as above provided.

The Court said:

> Title passed when first the raisin grapes became property which could be the subject of ownership and sale. A potential existence of the grapes seems to answer this requirement. Arques *v.* Wasson.[10] This, of course, was long before the attachment which was levied upon a portion of the crop while in "sweat boxes" undergoing the final curing process. When the grower's creditor, therefore, attached the raisin grapes or the raisins, whichever they were at the time of the levy, they belonged to respondent.

It is true that at common law, as declared in some of the States, the sale of a commodity then capable of delivery, without its delivery to the buyer, is either conclusive or presumptive evidence of fraud, if subsequent to the sale third parties in good faith acquire rights therein,[11] but the common law rule just stated is held to have little or no application in cases involving the sale of crops to be grown.[12] This conclusion is apparently based upon the fact that a lawful contract may be made for the sale of crops to be grown,[13] and as the crop is not then in existence, its delivery at the time of sale is manifestly impossible.[14]

In many of the States, statutes have been passed making the retention of possession of goods sold by the seller either presumptive or conclusive [15] evidence of fraud as to third persons subsequently acquiring rights in the property sold. Generally speaking, such statutes are so drawn that they have no application to the sale of growing crops or crops to be grown. For instance, in the case cited above, involving the Sun-Maid Raisin Growers of California, it was urged that the sale of the raisins was void because of the statute of frauds of California, but the court pointed out that this statute only declares that transfers of property without the delivery thereof are void "if made by a person having at the time the possession or control of the property." Obviously at the time the marketing contract covering the raisins was signed the grower did not have possession or control of the grapes which had not then been grown.[16]

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[9] Sun-Maid Raisin Growers of California *v.* Jones, —— Cal. App. ——, 274 P. 557, later affirmed by the State supreme court; see also Texas Hay Ass'n *v.* Angleton State Bank (Tex. Com. App.), 291 S. W. 846.

[10] Arques *v.* Wasson, 51 Cal. 620, 21 Am. Rep. 718.

[11] 24 R. C. L. sec. 312.

[12] Bellows *v.* Wells, 36 Vt. 599; McCarty *v.* Blevins, 13 Tenn. 195; Hull *v.* Hull, 48 Conn. 250, 40 Am. Rep. 165; 24 R. C. L. sec. 315.

[13] Dickey *v.* Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449.

[14] 24 R. C. L. sec. 315; Bellows *v.* Wells, 36 Vt. 599.

[15] Brown *v.* Herrick, 34 Idaho, 171, 200 P. 117.

Some of the State statutes relative to the retention of possession of goods sold by the seller make the retention of such possession merely presumptive evidence of fraud as to third persons. In a Minnesota case, referring to such a statute, the court said:

> It provides in express terms that such possession shall be presumed to be fraudulent and void as against subsequent purchasers in good faith, unless those claiming under such sale make it appear that the sale was made in good faith, and without any intent to defraud such purchasers.[17]

In this case a person purchased an automobile and allowed the machine to continue in the possession of the seller, who subsequently borrowed money on the machine, giving as security a chattel mortgage thereon. The buyer of the automobile brought suit against the person who claimed it under the chattel mortgage, and as the court found that the buyer of the automobile had acted in good faith, the buyer won.

Either by reason of statutes or by decisions of the courts, the rule with respect to the retention or possession of goods sold by the seller being only presumptive evidence of fraud as to third persons, has been adopted in many of the States.[18]

The common-law rule in some of the States made the retention of the possession of goods sold void as to third persons. The rule, apparently, at common law had no application to growing crops, and this common law, as well as the rules prescribed by statutes of frauds, is, generally speaking, not applicable to growing crops.

Again at common law and under statutes, generally speaking, if a third person subsequent to the sale of goods (the possession of which is retained by the seller) has notice of the fact that the goods have previously been sold, his rights are junior to the rights of the person who purchased the goods in the first instance, and under these circumstances the fact that there has been no actual delivery of the goods is immaterial;[19] for the general rule is that "a purchaser with notice of a prior contract to sell or to lease takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution."[20]

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[16] Sun-Maid Raisin Growers *v.* Jones, —— Cal. App. —— 274 P. 557; see also Bloom *v.* Welsh, 27 N. J. Law 177; Flynt *v.* Conrad, 61 N. C. 190, 93 Am. Dec. 588; Cook *v.* Steel, 42 Tex. 53.

[17] Wilson *v.* Walrath, 103 Minn., 412, 115 N. W. 203, 24 L. R. A. (N. S.) 1127; see also Kimball *v.* Cash, 176 N. Y. S. 541, 107 Misc. Rep. 363; Godman *v.* Olson, 38 N. D. 360, 165 N. W. 515.

[18] Shaul *v.* Harrington, 54 Ark. 305, 15 S. W. 835; Holliday *v.* McKinne, 22 Fla. 153; Osborn *v.* Ratliff, 53 Iowa 748, 5 N. W. 2 Iowa 778 (746); Gardiner Bank *v.* Hodgdon, 14 Me. 453; Brooks *v.* Powers, 15 Mass. 244, 8 Am. Dec. 99; Johnston *v.* Dick, Hill & McLean, 27 Miss. 277; Rea *v.* Alexander, 27 N. C. 644; Hombeck *v.* Vanmetre, 9 Ohio 153; Benjamin *v.* Madden, 94 Va. 66, 26 S. E. 392; Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685; Fitzgerald *v.* Meyer, 25 Neb. 77, 41 N. W. 123; Williams *v.* Brown, 137 Mich. 569, 100 N. W. 786; Prentiss Tool & Supply Co. *v.* Schirmer, 136 N. Y. 305, 32 Am. St. Rep. 737, 32 N. E. 849; W. A. Patterson Co. *v.* People's Loan and Savings Co., 158 Ga. 503, 123 S. E. 704.

[19] Hatch *v.* Oil Co., 100 U. S. 124; Clark *v.* Shannon & Mott Co., 117 Iowa 645, 91 N. W. 923; Bridgham *v.* Hinds, 120 Me. 444, 115 A. 197; Dieckmann *v.* Young, 87 Mo. App. 530; 35 Cyc. 304, 345.

[20] Pomeroy's Equity Jurisprudence, 3d Ed. sec. 688; Union Pacific Railway Co. *v.* McAlpine, 129 U. S. 305, 9 S. Ct. 286; Gore *v.* Condon, 82 Md. 649, 33 A. 261.

In view of the state of the law as indicated above, persons who buy farm products from producers who have entered into marketing contracts with their associations to sell such products to the association, run a great risk in doing so, even though they may be unaware of the marketing contract of the association, because it will be remembered that, if title to the products covered by a marketing contract has passed to the association, an association may be able to recover damages or the products from any person acquiring the same from a producer without its consent.

The foregoing discussion is entirely independent of the statutes that have been passed in some States providing for the filing or recording of marketing contracts of cooperative associations for the purpose of giving notice to the world of the rights of an association under them. If such a statute has been passed in a State, third persons are undoubtedly bound who attempt to purchase or acquire liens on the products of members after the filing or recording of the marketing contracts.

In Arizona,[21] Maine,[22] Oregon,[23] Virginia,[24] and Wisconsin,[25] provision has been made for the filing or recording of marketing contracts for the purpose of giving notice to all concerned of the rights of the association with respect to the crops covered by marketing contracts.

The cooperative marketing act of Indiana [26] provides that:

> Growers of agricultural products who have signed any such marketing agreements with cooperative marketing associations organized hereunder shall be permitted to place crop mortgages upon their crops; but said crop mortgages and any other liens shall be subordinate to the right of such association to take delivery of any such crops covered by the marketing agreement.

POOLING

Pooling is widely practiced by cooperatives. Pooling should be thought of as an averaging process, an averaging with respect to products, prices, expenses, or returns. In the case of products, this involves a grading of the products received from each member and a separation of such products according to grade for sale purposes. If the pool is a seasonal one, when all the products received from the members for a given crop year have been sold, the quantity that each member has had in each grade is multiplied by the average price per unit received for all the products in that grade, and thus the total amount that each member is entitled to receive after the deduction of marketing expenses and any other authorized deductions, is determined.

Daily, weekly, monthly, or seasonal pools, if authorized, could be established, or the pool could consist of a single shipment, say of livestock, but the principles underlying all of such pools are the same. Generally, in the case of long-time pools, one or more advances are made to members after the receipt of the products of a member, and then final settlement is made after the sale of all the products in the pool and after it is known what the total expenses of the association for the year will be.

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[21] 1923 Session Laws of Arizona, p. 137.

[22] 1925 Laws of Maine, ch. 213.

[23] Laws of Oregon, 1929, p. ——.

[24] Acts of Assembly of Virginia 1924, p. 39.

[25] 1927 Laws of Wisconsin, ch. 167; construed in Watertown Milk Producers Co-op. Ass'n *v.* Van Camp Packing Co., —— Wis. ——, 225 N. W. 209.

[26] Acts of 1925, p. 53.

Marketing expenses are pooled either on a unit of product or on a dollar basis. Marketing expenses, even in the case of those participating in pools of products that have a duration of less than one year, are usually on a yearly basis; and of course, this is fair, as expenses continue throughout the year and the association must be maintained. Broadly speaking, any pooling method for any of these things is valid provided that the members have consented thereto[27] either in the by-laws or contract.

The right of an association to determine conclusively the grade of products received from its members, if authorized to do so by its by-laws or marketing contract, is established.[28]

The question of whether pooling or grading is properly done would appear to be open to question only in case of fraud or such gross mistake as to imply bad faith.[29]

Unless an association is authorized to pool products or expenses or gains or losses, it may not do so. In an Oregon case involving a milk association, the association attempted to apportion losses arising on account of the fact that certain milk dealers had rejected milk. A member whose milk had been accepted and paid for by the dealer at the full sale price, objected to bearing any part of the loss on account of the rejected milk. He successfully sued the association and recovered the amount of the loss which the association sought to have him bear.[30] Of course, if the by-laws or marketing contract of an association provide for a certain method of pooling, this method and no other should be followed.[31]

EXCESS ADVANCES OR PAYMENTS

Cooperative associations frequently make advances or partial "payments" to their members on receipt of their products. Now, in the event that the advances or payments made should exceed the amount to which the member is entitled, after deducting marketing expenses and all other authorized deductions from the amount received from the sale of his products, may the association recover the amount of such excess advances or payments from the member? The answer is "Yes." The basis for the recovery is the doctrine that no man shall be allowed to enrich himself unjustly at the expense of another or shall be allowed to retain money that in "equity and good conscience" belongs to another.[32]

The simplest case in which this question could arise would probably be that of an association that functioned on a commission or brokerage basis, such, for instance, as a cooperative livestock-selling agency. If a shipper to such an agency should draw a draft against it in connection with a shipment of livestock made thereto, and the proceeds of the livestock on their sale, after marketing expenses had been deducted, should be less than the amount of the draft, the cooperative agency could then successfully sue the shipper for the difference between the amount of the draft and the net proceeds received for the livestock.

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[27] Washington Co-op. Egg & Poultry Ass'n *v.* Taylor, 122 Wash. 466, 210 P. 806; McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419; Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; Martinsburg & Potomac Railroad Co. *v.* March, 114 U. S. 549.

[28] Washington Co-op. Egg & Poultry Ass'n *v.* Taylor, 122 Wash. 466, 210 P. 806; McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419; Martinsburg & Potomac Railroad Co. *v.* March, 114 U. S. 549.

[29] Martinsburg & Potomac Railroad Co. *v.* March, 114 U. S. 549; New England Trust Co. *v.* Abbott, Ex'r, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Berger Mfg. Co. *v.* Huggins, 242 F. 853; Citizens' Independent Mill & Elevator Co. *v.* Perkins, 52 Okl. 242, 152 P. 443; Hayes Grain & Commission Co. *v.* Federal Grain Co., 169 Ark. 1072, 277 S. W. 521; Arkansas Cotton Growers' Co-op. Ass'n *v.* Brown, —— Ark. ——, 16 S. W. (2d) 177.

[30] Steelman *v.* Oregon Dairymen's League, Inc., 97 Or. 535, 192 P. 790.

[31] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n 171 Ark. 1155, 278 S. W. 419.

[32] Jackson *v.* Creek, 47 Ind. App. 541, 94 N. E. 416.

The right of commission merchants and factors to recover the amount of excess advances made by them is settled,[33] and this would include cooperative associations that function along the same general lines. In the case of cooperative associations that use the purchase-and-sale or the agency type of contract, the obligation of the association is to pay the member the amount received for his products on a pool basis, or otherwise, less authorized deductions. If a member, regardless of the type of contract involved, receives more than this amount, he has received something to which he is not entitled, and hence the association may recover it. A number of cooperative associations have done so.[34]

In the case just cited involving the California Raisin Growers' Association, the association, which functioned on an agency basis, successfully brought suit against some 600 growers on account of excess advances made to them, for the purpose of having the money distributed among members of the association who had been underpaid and among certain creditors of the association who were also parties to the suit.

In the case of excess advances or payments made by an association that functions on a pool basis, there is always the possibility, and in many instances it probably would be a fact, that some members had received less than they were entitled to, whereas other members had received more than the amount to which they were entitled. This situation would furnish an additional reason for allowing an association to recover excess advances. The principles under discussion are applicable, even in cases in which an association in its contract agrees to make an advance of a specified amount to growers, which amount proves to be excessive, because both parties assume that the products will bring a net amount larger than the advance. If this assumption proves to be incorrect, the necessary adjustments are in order. The association contracts to pay to its members only the net amount received by it for their products, minus authorized deductions. If more is paid, a member has received something to which he has no claim. No reason is apparent why these principles would not be as applicable to an unincorporated as to an incorporated association.

If an association made excess advances to its members with borrowed money and the advances proved to be excessive, resulting in the insolvency of the association, unless the excess advances were recovered from the members, the creditors of the association, if it failed or refused to take action to recover the excess advances, could have the association placed in the hands of a receiver. The receiver could then recover the excess advances from the members, because such excess advances are assets of the association or obligations due it.

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[33] Re Estate of Joseph P. Murphy Co., 214 Pa. 258, 63 A. 745, 5 L. R. A. (N. S.), 1147; Newburger-Morris Co. *v.* Talcott, 219 N. Y. 505, 114 N. E. 846, 3 A. L. R. 287.

[34] Arkansas Cotton Growers' Co-op. Ass'n *v.* Brown, —— Ark. ——, 16 S. W. (2d) 177; California Raison Growers' Ass'n *v.* Abbott, 160 Cal. 601, 117 P. 767; Sugar Loaf Orange Growers' Ass'n *v.* Skewes, 47 Cal. App. 470, 190 P. 1076; California Bean Growers' Ass'n *v.* Williams, 82 Cal. App. 434, 255 P. 751; Lake Charles Rice Milling Co. *v.* Pacific Rice Growers Ass'n. 295 F. 246; see also Farmers' Union Co-op. Shipping Ass'n of Natoma *v.* Schultze, 112 Kan. 675, 212 P. 670.

In a New York case in which a commercial concern made excess advances on wool to a cooperative association that was simply acting as the agent for growers, it was held that there could be no recovery against the association, but the right of the concern to recover such excess advances from the individual growers was recognized.[35]

EFFECT OF BREACH OF CONTRACT

What is the real character of the form of cooperative-marketing contract commonly entered into by cooperative associations with their members? Do such contracts constitute contracts between and among the members as well as with the association? Is a member relieved from the obligation to deliver his products to the association for marketing because the association has committed a breach of the marketing contract or has failed to abide by its by-laws?

The general rule is that "the party to a contract who commits the first breach is the wrongdoer and thereby absolves the other party from performance." But is this rule applicable to cooperative associations in their differences with their members? Strong reasons exist for urging that the rule has no application, or, at any rate, less application to such contracts than to the ordinary business contract. Cooperative contracts are apparently universally regarded as not only contracts with cooperative associations as legal entities, but as contracts between and among the various members.[36] An advantage given one member is ordinarily at the expense of other members. The defection of a member may increase the share of the total expenses that each of the others is called upon to pay.

The effectiveness and efficiency of an association depend to a high degree on the faithfulness with which each member works with all of the other members.

> They [marketing contracts] are not simply agreements entered into with an agent, although a few people may be selected to act in the capacity of officers to manage the business of the association. The agreements are essentially to and with all the other members of the co-operative association, and the interests of every member rests upon the same foundation, and no member can be advantaged to the detriment of any other member.[37]

To release a member from his contract or to permit him to defend a suit brought against him by the association by showing that directors or an officer, manager, or some other employee of the association has done something which should not have been done, or has failed to do something which should have been done, fails to take into consideration the obligation of the member in question to all of the other members. Clearly, the contract among the members is not breached by the act of omission or commission, as the case may be, on the part of a delinquent officer or manager of the association.

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[35] Mandell *v.* Cole, 244 N. Y. 221, 155 N. E. 106.

[36] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419; Staple Cotton Co-op. Ass'n *v.* Borodofsky, 143 Miss. 558, 108 So. 802; Haarparinne *v.* Butter Hill Fruit Growers' Ass'n, 122 Me. 138, 119 A. 116; Manchester Dairy System, Inc., *v.* Hayward, 82 N. H. 193, 132 A. 12; Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937; California Canning Peach Growers *v.* Downey et al., 76 Cal. App. 1, 243 P. 679; Anaheim Citrus Fruit Ass'n *v.* Yeoman, 51 Cal. App. 759, 197 P. 959; Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kan. 672, 216 P. 311.

[37] California Peach Growers *v.* Downey, 76 Cal. App. 1, 243 P. 679, 684.

The proposition becomes more transparent if the same situation arises with respect to an unincorporated association in which various producers are banded together by a contract which specifies that a certain party, or parties, is to act as marketing agent, and which vests in this agent certain stated powers. If the agent is delinquent or fails to abide by the terms of the contract, this would not release a producer from the contract or enable him to excuse nonperformance of his obligations under the contract; but it would be obvious that the remedy lay in discharging the agent or in taking other appropriate action within the association for correcting the situation.

Does the fact that an association is incorporated change the essential character of the enterprise? The interdependent relation among the members is present in each case. The object sought to be accomplished is the same. The means employed are identical except for incorporation. At least one appellate court has given partial if not complete application to the doctrine under discussion, and in this connection said: "Appellants signed the 'marketing contract' with the other members of the association. Hence, appellant's agreements were made in consideration of like agreements of the other members and for their mutual advantage. If appellants could be absolved from the performance of the contract because officers of the association had committed breaches of the contract in certain respects, it is certain that other members of the association would suffer by this course." [38]

In this case the court held that 118 members of the association, who had joined in a suit for the purpose of having the association placed in the hands of a receiver, would be required to carry out their marketing contracts in the future, but also held that the association should be enjoined from seeking to collect liquidated damages from the members on account of their failure to abide by their contracts in the past. As to the future, the court held that the members must specifically perform their contracts.

It has been held, however, that the alleged failure of the association correctly to account operated to relieve a member from his obligations under the contract.[39] Again it has been held that the release by the directors of an association of certain members operated to release other members from performing their contracts.[40] It has been intimated that the failure on the part of an association to enforce its marketing contract against certain members might operate to release others.[41]

In an Oregon case[42] in which the court found that, "The price did not depend on what any other grower was to get, and the release of another grower could not in any way increase or diminish his compensation," it was held that the release of a member from his contract did not release others.

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[38] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419.

[39] Brown *v.* Georgia Cotton Growers' Co-op. Ass'n, 164 Ga. 712, 139 S. E. 417; New Jersey Poultry Producers' Ass'n *v.* Tradelius, 96 N. J. 683, 126 A. 538.

[40] Staple Cotton Co-op. Ass'n *v.* Borodofsky, 143 Miss. 558, 108 So. 802.

[41] California Bean Growers' Ass'n *v.* Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A. L. R. 904.

[42] Phez Co. *v.* Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970, 25 A. L. R. 1090.

Generally speaking, it is submitted that when members of an association believe that the directors they have elected to manage the association, or its officers or other agents, are not complying with its charter, by-laws, or marketing contract, they should be required to seek relief within the association through the election of new directors and officers, or the enjoining of them, or through other corrective measures. To use a figure of speech, the members of a cooperative association embark together for a common voyage and no member should be allowed to leave the ship except in accordance with specified conditions.

MISMANAGEMENT NO DEFENSE

Mismanagement of the affairs of an association—that is to say, unwise conduct of it—is no defense to a suit for breach of a marketing contract.[43] The courts analogize the marketing contracts of an association for the delivery of products thereto to contracts of commercial corporations for the delivery of money thereto in payment for stock purchased, and the rule is that mismanagement of a commercial corporation is no defense to a suit for the recovery of the purchase price of stock.[44]

If a member of an association breaches his marketing contract during a given season, he can not successfully defend a suit brought by the association on account of such breaches by showing that subsequent thereto the association breached the contract.[45] The assertion by a producer that he received less for his products through the association than he would have received by selling to others is no defense to a suit for breach of the contract.[46]

DEDUCTIONS

What deductions may an association make from the returns received from the products of its members? The answer is, Only those deductions that it is authorized to make under the contract or by-laws of the association.[47] The fact that deductions in addition to those specifically authorized appear necessary or highly advisable does not justify such deductions.

Money deducted from the returns from the sale of members' products may be used by the association only for the specific purposes for which deducted. In other words, if the marketing contract or a by-law of an association specifies that deductions shall be made for certain itemized purposes, the deductions made can lawfully be employed for no other purposes.

Membership fees, or dues, or money received from the sale of stock, or any other money, (unless received with the understanding that it is to be used for a specific object), may be used for any purpose or object covered by the charter of the association; and if the charter is sufficiently broad, such money could be used, as was done in a California case,[48] for instance, for advocating a higher tariff on the products handled by the association.

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[43] Nebraska Wheat Growers' Ass'n *v.* Smith, 115 Neb. 177, 212 N. W. 39; Pittman *v.* Tobacco Growers Co-op. Ass'n, 187 N. C. 340, 121 S. E. 634.

[44] Mississippi, Ouachita & Red River R. R. Co. *v.* Cross, 20 Ark. 443, 7 R. C. L. sec. 235; Fletcher on Corporations, v. 2, sec. 652; American Building & Loan Ass'n *v.* Rainbolt, 48 Neb. 434, 67 N. W. 493. See also Brewer *v.* Boston Theater Co., 104 Mass. 378.

[45] Nebraska Wheat Growers' Ass'n *v.* Smith, 115 Neb. 177, 212 N. W. 39; California Bean Growers Ass'n *v.* Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A. L. R. 904.

[46] Nebraska Wheat Growers' Ass'n *v.* Smith, 115 Neb. 177, 212 N. W. 39; Arkansas Cotton Growers' Co-op. Ass'n *v.* Brown, —— Ark. ——. 16 S. W. (2d) 177.

[47] Silveira *v.* Associated Milk Producers, 63 Cal. App. 572, 219 P. 461.

Unless expressly authorized to do so, an association may not use money derived from the sale of the crop of one season and to which its growers are entitled, for financing the handling of the crop of a succeeding season.[49] Under the usual type of marketing contract the courts regard each year as a unit, so that those who were members during a given year are entitled to the money arising from that year's operations after subtracting expenses and other authorized deductions, even though, it has been held, a part of the money received consisted of commissions paid by nonmembers to the association for selling their products, although the association was not authorized to handle nonmember business.[50]

An association may, in good faith, where its contract provides therefor, pay off a mortgage on a member's crop so as to permit the marketing of the crop through the association.[51] If a loss arises from paying off such a mortgage, it is chargeable against and should be borne by the member in question;[52] and the fact that an association suffers a loss by paying off a mortgage on a member's crop, if the payment was made in good faith, does not relieve other members from their contracts.[53]

If the by-laws or marketing agreement authorizes deductions for permanent reserves, that is for money that may be retained and used by the association in the year or years following that in which deducted, such a provision is valid.[54] The question arises, Is an association required to account to a member for deductions made for permanent reserves other than by showing the amount of them? If the deductions were made pursuant to provisions that showed that the member was merely making a loan to the association which was to be paid on the dissolution of the association or on some future date or occasion, then obviously the member becomes a creditor of the association subject to the terms of the loan, and such is the case where certificates of indebtedness are employed.

If, on the other hand, there is nothing to show that the deductions for reserves are loans, then the member has no legal claim of any character upon the association in the absence of a stipulation providing therefor. Under such circumstances neither stockholder nor member could successfully sue an association to recover the amount of deductions for reserves made from the proceeds received for his products.

Many of the cooperative statutes provide for the appraisal of the interest of a member of a nonstock association in the organization on the termination of his membership and the payment to him on stated terms of the amount thus ascertained. But this does not mean that a withdrawing member would be entitled to receive the amount deducted for reserves from the proceeds derived from the sale of his products. The appraisal of the interest of a member of a nonstock association on the termination of his membership where the statutes provide for this procedure is equivalent to the price received by a stockholder in a stock association on the transfer of his stock.

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[48] California Bean Growers' Ass'n *v.* Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A. L. R. 904.

[49] California Bean Growers' Ass'n *v.* Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A. L. R. 904.

[50] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419.

[51] Cunningham *v.* Long (Maine Potato Growers' Exchange), —— Me. ——, 135 A. 198.

[52] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419.

[53] Cunningham *v.* Long (Maine Potato Growers' Exchange), —— Me. ——, 135 A. 198.

[54] McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S. W. 419; Burley Tobacco Growers' Co-op. Ass'n *v.* Tipton, —— Ky. ——, 11 S. W. (2d) 119.

On the dissolution of an association, at common law, whether stock or nonstock, the money in the treasury after the payment of the debts of the association goes to the persons who are at that time stockholders or members, as the case may be.[55] Those who had previously contributed to the organization but were not stockholders or members, at the dissolution of the association would be entitled to nothing. This is the rule that is applicable to associations except as it has been modified by statute, charter, by-laws, or contract.

Reserves of an association may be used for the payment of its debts, and until the debts of an association have been paid[56] the reserves can not be distributed among its members or stockholders.

CONTROL OF CROPS BY LANDLORD

Entirely independent of the conclusive presumption provision, may an association require that crops grown under the share-lease plan be marketed through it? An association could include a provision in its marketing contract requiring a member, if he leased his farm or any part thereof after signing the marketing contract, to include a provision in the lease stipulating that all crops grown on the farm should be marketed through the association. In addition, a provision could be included requiring the landlord to pay liquidated damages for his failure to have the share of the crops belonging to his tenant marketed through the association.[57] It is clear that if a lease provides for a share tenancy, then, regardless of the time that it is entered into, the association would be entitled to receive at least the landlord's share of the crop for marketing.[58]

In the cases just cited it appeared that the tenants had the right to sell the landlord's part of the cotton crop, but it was held in each case that this fact was immaterial, as the leases provided that the landlord receive a part of the crop as his rent.

In North Carolina it was held that a landlord was not liable for damages to the association because of the failure of his tenant to market his share of the crop through the association.[59] The North Carolina cooperative statute does not contain the conclusive presumption provision.

In the absence of a provision in the marketing contract requiring a landlord to have the share of the crops belonging to his tenants marketed through an association and in the absence of a conclusive presumption provision in the cooperative act of the State, it would appear that there is no basis for holding a landlord liable on account of the fact that the share of the crops of his tenants is not marketed through the association, nor would there be a basis for holding the tenants liable under such circumstances.

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[55] Clearwater Citrus Growers' Ass'n *v.* Andrews, —— Fla. ——, 87 So. 903; Union Benev. Society No. 8 *v.* Martin, 113 Ky. 25, 67 S. W. 38; Dade Coal Co. *v.* Penitentiary Co., 119 Ga. 824, 19 R. C. L. 1267; Henry *v.* Cox, 25 Ohio App. 487, 159 N. E. 101; Missouri Bottlers' Ass'n *v.* Fennerty, 81 Mo. App. 525; 5 C. J. 1360.

[56] Texas Farm Bureau Cotton Ass'n *v.* Lennox et al. (Tex. Civ. App.), 297 S. W. 743; Associated Fruit Co. *v.* Idaho-Oregon Fruit Growers' Ass'n, 44 Idaho 200, 256 P. 99.

[57] Dark Tobacco Growers' Co-op. Ass'n *v.* Daniels, 215 Ky. 67, 284 S. W. 399.

[58] Long *v.* Texas Farm Bureau Cotton Ass'n (Tex. Civ. App.), 270 S. W. 561; Main *v.* Texas Farm Bureau Cotton Ass'n (Tex. Civ. App.), 271 S. W. 178.

[59] Tobacco Growers' Co-op. Ass'n *v.* Bissett, 187 N. C. 180, 121 S. E. 446.

CROP MORTGAGES

Generally speaking, a person who takes a crop mortgage or other lien on commodities occupies a position virtually identical with that of a purchaser of the commodities involved. In other words, generally speaking, in determining the rights of the holder of a crop mortgage to avail himself of the products covered thereby, the rules that would be applicable if he had purchased the crop involved are applicable. In Kansas,[60] Kentucky,[61] and Tennessee,[62] it has been held independent of statute that the person who takes a mortgage on a crop with knowledge of the fact that it is covered by a marketing contract may be compelled by injunction to market the crop through the association, which in turn after making the deductions authorized by the contract must account to the person holding the mortgage before making any payments to the member.

In North Carolina,[63] Alabama,[64] Louisiana,[65] it has been held that even though the party taking the mortgage has knowledge at the time that the crop is covered by a marketing contract, his rights are superior to those of the association, and the association can not compel the delivery of the crop to it for marketing. It is believed that the holdings in the North Carolina, Alabama, and Louisiana cases were based, to a large extent at least, on the mandatory character of the statutes of those States defining the superiority of recorded liens and mortgages.

Another factor which should be considered in all of these cases is the exact character of the purchase-and-sale contract of the association. If the contract is a contract to sell,[66] then the rights of the association may be different from what would be the case if the contract was one of sale.

In North Carolina, the fact that the crop is covered by a mortgage will not prevent the association from enjoining the member from disposing of his crop outside the association subject to the right of the holder of the mortgage to demand a sufficient amount of the crop to satisfy his mortgage,[67] but it is otherwise in Alabama.[68]

In Kansas,[69] it was held that where a producer signed a marketing contract which in effect stated that there were no encumbrances of any kind against his crop, he was liable for liquidated damages to the association if delivery of his crop was prevented by a mortgage executed prior to the signing of the marketing contract, and in all cases liquidated damages may be recovered by an association (if the contract contains no exception), although delivery of the crop is prevented by a crop mortgage.[70]

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[60] Kansas Wheat Growers' Ass'n *v.* Floyd et al., and Kansas Wheat Growers' Ass'n *v.* Robben et al., 116 Kan. 522, 227 P. 336.

[61] Redford et al. *v.* Burley Tobacco Growers' Co-op. Ass'n, 205 Ky. 515, 266 S. W. 24; Feagain *v.* Dark Tobacco Growers' Co-op. Ass'n, 202 Ky. 801, 261 S. W. 607.

[62] Dark Tobacco Growers' Co-op. Ass'n *v.* Dunn, 150 Tenn. 614, 266 S. W. 308; see also Oregon Growers' Co-op. Ass'n *v.* Lentz, 107 Or. 561, 212 P. 811; Monte Vista Potato Growers' Co-op. Ass'n *v.* Bond, 80 Colo. 516, 252 P. 813.

[63] Tobacco Growers' Co-op. Ass'n *v.* L. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545, 47 A. L. R. 928; Tobacco Growers' Co-op. Ass'n *v.* Patterson, 187 N. C. 252, 121 S. E. 631.

[64] Bishop *v.* Alabama Farm Bureau Cotton Ass'n, —— Ala. ——, 110 So. 711.

[65] Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n *v.* Clark, 160 La. 294, 107 So. 115.

[66] Tobacco Growers' Co-op. Ass'n *v.* L. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545, 47 A. L. R. 928.

[67] Tobacco Growers' Co-op. Ass'n *v.* Patterson, 187 N. C. 252, 121 S. E. 631.

[68] Bishop *v.* Alabama Farm Bureau Cotton Ass'n, —— Ala. ——, 110 So. 711.

[69] Kansas Wheat Growers' Ass'n *v.* Leslie, —— Kan. ——, 271 P. 284.

If a cooperative association in any State receives a crop on which a third person has a superior claim, the association runs a risk in receiving and handling the crop. If the person having the superior claim consents to having the association handle the crop, then there is no danger. In all cases in which an association receives a crop on which there is a lien or crop mortgage great care should be exercised to account to the holder of the lien or mortgage before making any payments to the grower. This is true whether the claim of the association is superior to the claim of the holder of the lien or mortgage or not.

An association would be liable for conversion if it handled and sold a crop on which a third person had a superior claim, namely, a lien or crop mortgage. On the other hand, even though the claim of the association is superior, if the association has knowledge of the crop lien or mortgage, then it should account to the holder thereof before making payment to the grower. An association ordinarily is free to take a mortgage on any property of a member including a crop to secure it for advances made or to be made.

LIQUIDATED DAMAGES

Liquidated damages are damages the amount of which has been determined in advance by agreement between the parties. Long before the days of Blackstone, parties inserted provisions in their contracts that one should pay a certain sum, in case he breached the contract, to the other as satisfaction for the loss sustained by the breach. One of the most common expressions used in discussing the term "liquidated damages" is "penalty." And it is frequently said that a penalty can not be recovered, but that liquidated damages may be. A penalty may, in this connection, be defined as an amount fixed by the parties to a contract to be paid by one of them in case of breach, which is greatly, or perhaps grossly, in excess of the damages which may actually be suffered from such a breach. When the amount fixed is held to be a penalty, such amount can not be recovered but only the actual damages suffered.

A case which well illustrates this view is one in which the defendant entered into a bond to pay $10,000 in case he failed to secure releases, within a year, from certain parties having claims against him. One of the claims amounted to only $9.80, and failure to obtain a release of this claim would have made the entire amount of the bond due and payable. The Supreme Court held that the $10,000 was a penalty and not liquidated damages, and a judgment for 1 cent was affirmed.[71] That the parties to a contract have described the amount to be paid in case of a breach as "liquidated damages" or as a "penalty" is not conclusive upon the point,[72] although the term used by the parties has been held to have some weight.[73]

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[70] Kansas Wheat Growers' Ass'n *v.* Ast et al., 118 Kan. 247, 234 P. 963; North Carolina Cotton Growers' Co-op. Ass'n *v.* Bullock, 191 N. C. 464. 132 S. E. 154. A. L. R. 924; Lennox *v.* Texas Farm Bureau Cotton Ass'n (Tex. Civ. App.), 16 S. W. (2d) 413.

[71] Bignall *v.* Gould, 119 U. S. 495.

[72] Northwestern Terra Cotta Co. *v.* Caldwell, 234 F. 491, 496.

In a certain case the defendant hired a yacht for four months for $10,000 and agreed, in the event he failed to return it, to pay $75,000, which was stated to be the value of the yacht for the purpose of the contract. The yacht was destroyed, and suit was brought for the recovery of the $75,000. The Supreme Court affirmed a judgment for this amount, and in doing so, said in part:

> Whether a particular stipulation to pay a sum of money is to be treated as a penalty or as an agreed acertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract.[74]

In 1904 an agreement was entered into for the erection of two laboratory buildings for the Department of Agriculture in Washington. The contract called for the completion of the buildings in 30 months, and for a delay of 101 days beyond the contract period the Government deducted $200 a day, the amount stipulated in the contract as liquidated damages, a total of $20,200. Later, suit was brought against the Government for the recovery of this amount. In holding that no recovery could be had, the Supreme Court of the United States said:[75]

> * * * Courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

The foregoing quotation expresses the common law relative to liquidated damages.

In a number of cases involving cooperative associations, the courts have found that at common law they were entitled to liquidated damages.[76] On the other hand, in a number of cases it was held that at common law provisions in by-laws or contracts providing for the payment by members of stipulated sums in the event they failed to market their products or livestock through the association were unlawful as they were deemed to be in restraint of trade.[77]

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[73] Tayloe *v.* T. & S. Sandiford, 7 Wheat. 13.

[74] Sun Printing and Publishing Ass'n *v.* Moore, 183 U. S. 642.

[75] Wise, Trustee in Bankruptcy of Stannard, *v.* United States, 249 U. S. 361.

[76] Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; Ex parte Baldwin County Producers' Corporation, 203 Ala. 345, 83 So. 69; Washington Co-op. Egg & Poultry Ass'n *v.* Taylor, 122 Wash. 466, 210 P. 806; Bullville Milk Producers' Ass'n *v.* Armstrong, 178 N. Y. S. 612; Castorland Milk & Cheese Co. *v.* Shantz, 179 N. Y. S. 131; Manchester Dairy System, Inc., *v.* Hayward, 82 N. H. 193, 132 A. 12; Potter *v.* Dark Tobacco Growers' Co-op. Ass'n, 201 Ky. 441, 257 S. W. 33; Elephant Butte Alfalfa Ass'n *v.* Rouault, —— N. M. ——, 262 P. 185.

[77] Reeves *v.* Decorah Farmers' Co-op. Soc., 160 Iowa 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104; Ludowese *v.* Farmers Mut. Co-op. Co., 164 Iowa 197, 145 N. W. 475; Burns *v.* Wray Farmers' Grain Co., 65 Colo. 425, 176 P. 487; Atkinson *v.* Colorado Wheat Growers' Ass'n, 77 Colo. 559, 238 P. 1117; Colorado Wheat Growers' Ass'n *v.* Thede, 80 Colo. 529, 253 P. 30; Georgia Fruit Exchange *v.* Turnipseed, 9 Ala. App. 123, 62 So. 542.

The by-law in the Iowa case first cited, provided that any member of the association should forfeit 5 cents for every hundredweight of produce or livestock sold to any competitor of the association. The association bought and sold the produce and livestock of nonmembers as well as that of members. The by-law, on its face, was aimed at competitors of the association and did not disclose that its purpose was the maintenance and upkeep of the association. It will be remembered that provisions for liquidated damages are sometimes referred to as maintenance clauses on the well-founded theory that all members of a marketing agency should contribute to its maintenance and upkeep even though they may not make use of it for a particular period. In the Iowa case, the court held that the by-law was unlawful as it was deemed to be in restraint of trade.

In the other cases cited with the Iowa case just discussed, the courts reached similar conclusions and for the same reason. Subsequent to the decision of the Iowa cases, a cooperative marketing act was enacted in that State which expressly authorized associations to provide for liquidated damages in their contracts and by-laws, and under this act the supreme court of that State held that a provision in the by-laws of a livestock association for the payment of 25 cents per hundred pounds for all livestock marketed by members outside the association was valid.[78] So that, so far as associations incorporated under the cooperative act of Iowa are concerned, they may provide for liquidated damages in their contracts or by-laws.

In Colorado, the rule announced by the supreme court holding that provisions in contracts or by-laws which caused a member of an association to become liable to the association for a specified amount in the event he marketed his products outside the association were illegal, was changed by the supreme court in later cases in which the liquidated damage clause provisions were authorized by cooperative acts under which the associations were formed.[79] The Alabama case referred to was decided by an intermediate court of that State and was superseded by a decision of the supreme court of the State.[80]

In many of the cooperative statutes, language is included which expressly authorizes associations to include provisions in their contracts and by-laws for liquidated damages. These provisions in the cooperative statutes specify that the sums thus fixed shall be reasonable. The supreme courts of many of the States have passed upon the contracts of cooperative associations formed under such statutes and in every instance have upheld the provisions contained in them with respect to liquidated damages. For instance, 5 cents per pound in the case of tobacco,[81] 5 cents per pound in the case of cotton,[82] 25 cents per bushel in the case of wheat,[83] 50 cents per box in the case of fruit,[84] and 5 cents per dozen in the case of eggs,[85] have all been upheld.

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[78] Clear Lake Co-op. Live Stock Shippers' Ass'n *v.* Weir, 200 Iowa 1293, 206 N. W. 297.

[79] Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937.

[80] Ex parte Baldwin County Producers' Corporation, 203 Ala. 345, 83 So. 69.

[81] Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; List *v.* Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. 361, 151 N. E. 471; Dark Tobacco Growers' Co-op. Ass'n *v.* Mason, 150 Tenn. 228, 263 S. W. 60; Dark Tobacco Growers' Co-op. Ass'n *v.* Daniels, 215 Ky. 67, 284 S. W. 399; Dark Tobacco Growers' Co-op. Ass'n *v.* Robertson, 84 Ind. App. 51, 150 N. E. 106.

[82] South Carolina Cotton Growers' Co-op. Ass'n *v.* English, —— S. C. ——, 133 S. E. 542; Cotton Growers' Co-op. Ass'n *v.* Bullock, 191 N. C. 464, 132 S. E. 154.

[83] Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kan. 672, 216 P. 311; Nebraska Wheat Growers' Ass'n *v.* Norquest, 113 Neb. 731, 204 N. W. 798.

It should not be assumed from the foregoing that an association, even under a statute authorizing it to provide for liquidated damages is free to fix any amount as such damages. On the contrary, the amount should always be reasonable and not so extravagantly large as to indicate that compensation to the association is not the object sought to be accomplished. When the legality of cooperative associations was once established, it followed as a matter of course that such associations were entitled to provide for liquidated damages under circumstances comparable with those under which other entities might provide for and recover such damages, because liquidated damages were well known to the common law and are in no sense peculiar to cooperation. At the present time it is believed that cooperative associations in each of the States may provide for liquidated damages by reason of provisions existing in the statutory law of the State or by reason of the common law.

Some interesting cases involving liquidated damages have been before the courts. In a Kentucky case a member of the Dark Tobacco Growers' Cooperative Association rented his farm for cash rent and went to the city and there worked as a carpenter. The association sued the landlord for liquidated damages of 5 cents per pound on account of the tobacco grown and sold by the tenant, who was not a member of the association and who marketed the tobacco through other channels. The contract of the landlord with the association covered all the tobacco grown on his land. The court held that the association was entitled to recover liquidated damages amounting to $250, and referred to a provision in the cooperative act of Kentucky, which declares that it is a conclusive presumption that a member controls the products grown on his land.[86]

Again it has been held that the inability of a member to deliver his products because of a crop mortgage, does not prevent the association from recovering liquidated damages on account of his failure to deliver.[87]

In the cases last cited there were no exceptions in the contracts excusing failure to deliver because of the reasons therefor. Hence, the courts followed the general rule that impossibility of performance of a contract, unless created by an act of God, the law, or the complaining party, does not, as a rule, excuse failure to perform.[88] In other words, the members in the cases cited had agreed to deliver their products, and having failed to do so without a lawful excuse, they were liable for liquidated damages.

In drafting a provision for liquidated damages, care should be taken that the rule prescribed for ascertaining the damages will be fair, equitable, and clear under all circumstances. For instance, a provision for the payment of $10 per cow in the event a member marketed any milk outside the association has been criticized on the ground that it is uncertain whether the $10 per cow is to be determined on a per-day basis or once and for all, or whether it would be applicable if a member marketed outside the association the milk from some cows but not from all.[89]

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[84] Lee *v.* Clearwater Growers' Ass'n, —— Fla. ——, 111 So. 722; Anaheim Citrus Fruit Ass'n *v.* Yeoman, 51 Cal. App. 759, 197 P. 959.

[85] Poultry Producers of Central California *v.* Nilsson, 197 Cal. 245, 239 P. 1086.

[86] Dark Tobacco Growers' Co-op. Ass'n *v.* Daniels, 215 Ky. 67, 284 S. W. 399.

[87] North Carolina Cotton Growers' Co-op. Ass'n *v.* Bullock, 191 N. C. 464, 132 S. E. 154; Bishop *v.* Alabama Farm Bureau Cotton Ass'n, —— Ala. ——, 110 So. 711; Kansas Wheat Growers' Ass'n *v.* Ast et al., 118 Kan. 247, 234 P. 963; Lennox *v.* Texas Farm Bureau Cotton Ass'n (Tex. Civ. App.), 16 S. W. (2d) 413.

[88] Dermott *v.* Jones, 2 Wall. 1.

SPECIFIC PERFORMANCE

"Specific performance may be defined as the actual accomplishment of a contract between parties bound to fulfill it, for a decree for specific performance is nothing more or less than means of compelling a party to do precisely what he ought to have done without being coerced by a court."[90]

It should be borne in mind that the term "specific performance" is the name of an equitable remedy, by means of which a person is affirmatively compelled by the court to perform his contract. It is true that growers are frequently enjoined from disposing of their products outside the association of which they are members, in violation of their contracts; and this, generally speaking, results in the contract actually being performed, but, strictly speaking, this is not what is meant by the term "specific performance." The cooperative statutes that have been enacted by the States during the last few years usually contain a provision stating that an association shall be entitled, in the event of a breach or threatened breach of its marketing contract, "to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof."[91]

Many cases have been before the courts involving the right of cooperative associations to the remedies of specific performance and injunction on account of the statutory provision in question. In Kansas, it was held that the statutory provision was virtually mandatory on the court, at least under normal conditions, and that the legislature was competent to enact a rule of this kind which was binding on the courts.[92] In States other than Kansas substantially similar conclusions have been reached in cases involving the right of associations to the remedies of injunction and specific performance under the statutory provision in question.[93]

In many cases brought by cooperative associations against their members to prevent them from violating their contracts, the association in question has asked the court to enjoin the member from disposing of his products to third persons, without asking the court to decree the specific performance of the contract involved. Some of these cases will be discussed later, under the heading "Injunctions."

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[89] Pierce County Dairymen's Ass'n *v.* Templin, 124 Wash. 567, 215 P. 352; see also Watertown Milk Producers' Co-op. Ass'n *v.* Van Camp Packing Co., —— Wis. ——, 225 N. W. 209.

[90] 25 R. C. L. 203.

[91] See par. (b) of sec. 18 of the Bingham Cooperative Marketing Act of Kentucky, on p. 123 in appendix.

[92] Kansas Wheat Growers' Ass'n *v.* Schulte. 113 Kan. 672, 216 P. 311.

[93] Lee *v.* Clearwater Growers' Ass'n, —— Fla. ——, 111 So. 722; Texas Farm Bureau Cotton Ass'n *v.* Stovall, 113 Tex. 273, 253 S. W. 1101; South Carolina Cotton Growers' Co-op. Ass'n *v.* English, 135 S. C. 19, 133 S. E. 542; Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937; Arkansas Cotton Growers' Co-op. Ass'n *v.* Brown, 168 Ark. 504, 270 S. W. 946; McCauley *v.* Arkansas Rice Growers' Co-op. Ass'n, 171 Ark 1155, 287 S. W. 419; Warren *v.* Alabama Farm Bureau Cotton Ass'n, 213 Ala. 61, 104 So. 264; Harrell *v.* Cane Growers' Co-op. Ass'n, —— Ga. ——, 126 S. E. 531; Colma Vegetable Ass'n *v.* Bonetti, —— Cal. App. ——, 267 P. 172; Nebraska Wheat Growers' Ass'n *v.* Smith, 115 Neb. 177, 212 N. W. 39; Brown *v.* Staple Cotton Co-op. Ass'n, 132 Miss. 859, 96 So. 849.

Independent of a statutory provision entitling a cooperative association to the remedy of specific performance, will courts of equity thus compel members of cooperative associations to perform their contracts? The fundamental rule with respect to this matter is that no one is entitled to a decree for specific performance, an injunction, or other equitable relief where the remedy at law is plain, adequate, and complete. In general, courts of equity will refuse to grant a decree for specific performance or an injunction if compensation in money for the breach of the contract would constitute full and complete satisfaction. In the case of contracts involving personal property which can be easily purchased in the open market, a decree for specific performance will not as a general rule be granted. If a cooperative association is restricted, by the statute under which it is formed, by its charter, or by its contract, to dealing only with its members, it could not legally buy products to take the place of those which its members refused to deliver, and this fact has been referred to in some instances by the courts as constituting a reason why an association was entitled to have its contract with a member performed.[94]

Even though there is no provision in the law of a State specifically entitling an association to the remedies of specific performance and injunction against its members, the courts in some instances have held that associations were entitled to both of these remedies.[95]

Although most of the cases that have come before the courts involving the right of an association to the remedy of injunction or specific performance or both have involved the purchase-and-sale form of contract, the courts have enforced agency contracts by these remedies.[96]

Associations formed in one State have frequently been held entitled to the remedies of injunction and specific performance in suits brought in other States.[97]

Outside the field of cooperation, the courts have upheld the right of commercial concerns to the remedies of specific performance and injunction with respect to oil,[98] tomatoes,[99] and pineapples,[1] where it appeared that the products named could not be easily obtained in the open market. Some courts will refuse to decree the specific performance of a contract while enjoining the delinquent party from disposing of the products involved to third persons. Thus, the Supreme Court of Washington, independent of statute, in a cooperative case refused under the general principles of equity to decree the specific performance of the contract on the ground that it would call for constant supervision, but enjoined the member from disposing of his cranberries outside the association.[2] A similar conclusion was reached by the Supreme Court of Oregon.[3]

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[94] Oregon Growers' Co-op. Ass'n *v.* Lentz, 107 Or. 561, 212 P. 811; Bishop *v.* Alabama Farm Bureau Cotton Ass'n, —— Ala. ——, 110 So. 711; Manchester Dairy System, Inc., *v.* Hayward, 82 N. H. 193, 132 A. 12; Dark Tobacco Growers' Co-op. Ass'n *v.* Dunn et al., 150 Tenn. 614, 266 S. W. 308; Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kan. 672, 216 P. 311.

[95] Elephant Butte Alfalfa Ass'n *v.* Rouault, —— N. M. ——, 262 P. 185; Manchester Dairy System, Inc., *v.* Hayward, 82 N. H. 193, 132 A. 12.

[96] Elephant Butte Alfalfa Ass'n *v.* Rouault, —— N. M. ——, 262 P. 185; Elmore *v.* Maryland & Virginia Milk Producers' Ass'n, 145 Va. 42, 134 S. E. 472.

[97] Dark Tobacco Growers' Co-op. Ass'n *v.* Dunn, 150 Tenn. 614, 266 S. W. 308; Brown *v.* Staple Cotton Co-op. Ass'n, 132 Miss. 859, 96 So. 849; Elephant Butte Alfalfa Ass'n *v.* Rouault, —— N. M. ——, 262 P. 185; Manchester Dairy System, Inc., *v.* Hayward, 82 N. H. 193, 132 A. 12; Nebraska Wheat Growers' Ass'n v. Norquest, 113 Nebr. 731, 204 N. W. 798.

[98] Texas Co. *v.* Central Fuel Co., 194 F. 1; see also American Smelting & Refining Co. *v.* Bunker Hill & Sullivan Mining Co., 248 F. 172.

[99] Curtis Bros. Co. *v.* Catts, 72 N. J. Eq. 831, 66 A. 935.

[1] Hawaiian Pineapple Co., Ltd., *v.* Saito, 270 F. 749.

INJUNCTIONS

"An injunction is an order issued by a court of equity, requiring a party to do or refrain from doing certain acts."[4] Injunctions are usually issued to prevent a threatened injury or to restrain the doing of wrongful acts. Generally speaking, it appears settled that cooperative associations are entitled to enjoin their members from disposing of their products to third persons in violation of their contracts. Many of the cooperative statutes contain a provision entitling associations formed under them to the remedy of injunction against their members to prevent the violation by them of their contracts. A number of cases are cited under the preceding section which are directly applicable here. Other cases are here cited in which associations enjoined their members without asking the court to decree the specific performance of the contract involved.[5] Independent of statute, the courts have held in a number of instances that cooperative associations were entitled to enjoin their members from disposing of their products outside the association.[6]

In a few cases involving extraordinary situations, the courts have denied associations the remedies of specific performance and injunction. In an Alabama case [7] the court said that the statutory provisions relative to the equitable remedies under discussion were to "be constructed as contemplating the use of such remedies only in case they shall be found consistent with commonly accepted principles of right and justice," and the court, therefore, completely denied the association the remedies in question because of a mortgage held by a third person on the crop.

In a similar case arising in North Carolina [8] the court enjoined the member from disposing of his crop outside the association, subject to the right of a holder of the mortgage on the crop to demand and receive enough tobacco to satisfy the mortgage.

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[2] Washington Cranberry Growers' Ass'n *v.* Moore, 117 Wash. 430, 201 P. 773, 204 P. 811.

[3] Phez Co. *v.* Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970.

[4] 22 Cyc. 740.

[5] Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; Tobacco Growers' Co-op. Ass'n *v.* Spikes, 187 N. C. 367, 121 S. E. 636; Tobacco Growers' Co-op. Ass'n *v.* Battle, 187 N. C. 260, 121 S. E. 629; Tobacco Growers' Co-op. Ass'n *v.* Patterson, 187 N. C. 252, 121 S. E. 631; Potter *v.* Dark Tobacco Growers' Co-op. Ass'n, 201 Ky. 441, 257 S. W. 33; Burley Tobacco Growers' Co-op. Ass'n *v.* Devine, 217 Ky. 320, 289 S. W. 253; Elmore *v.* Maryland & Virginia Milk Producers' Ass'n, 145 Va. 42, 134 S. E. 472; Washington Wheat Growers' Ass'n *v.* Leifer, 132 Wash. 602, 232 P. 339; Northwest Hay Ass'n *v.* Hanson et ux., 135 Wash. 47, 236 P. 561; Pierce County Dairymen's Ass'n *v.* Templin, 124 Wash. 567, 215 P. 352; Washington Co-op. Egg & Poultry Ass'n *v.* Taylor, 122 Wash. 466, 210 P. 806; Minnesota Wheat Growers' Co-op. Marketing Ass'n *v.* Huggins, 162 Minn. 471, 203 N. W. 420; Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937; Nebraska Wheat Growers' Ass'n *v.* Norquest, 113 Neb. 731, 204 N. W. 798; Kansas Wheat Growers' Ass'n *v.* Charlet, 118 Kan. 765, 236 P. 657.

[6] Oregon Growers' Co-op. Ass'n *v.* Lentz, 107 Or. 561, 212 P. 811; Phez Co. *v.* Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970, 25 A. L. R. 1090; Washington Cranberry Growers' Ass'n *v.* Moore, 117 Wash. 430, 201 P. 773, 204 P. 811, 25 A. L. R. 1077; Grant County Board of Control *v.* Allphin, 152 Ky. 280, 153 S. W. 417; Owen County Burley Tobacco Soc. *v.* Brumback, 128 Ky. 137 S. W. 710; Elephant Butte Alfalfa Ass'n *v.* Rouault, —— N. M. ——, 262 P. 185; Manchester Dairy System, Inc., *v.* Hayward, 82 N. H. 193, 132 A. 12; Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231.

[7] Bishop *v.* Alabama Farm Bureau Cotton Ass'n, —— Ala. ——, 110 So. 711; see also Lennox *v.* Texas Farm Bureau Cotton Ass'n (Tex. Civ. App.), 16 S. W. (2d) 413.

[8] Tobacco Growers' Co-op. Ass'n *v.* Patterson, 187 N. C. 252, 121 S. E. 631; see also Tobacco Growers' Ass'n *v.* L. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545.

In another North Carolina case[9] the court refused an injunction because the association had not settled with the member in full for a crop previously delivered and it appeared that the member was obliged "to raise money for the necessary supplies of himself and family." In refusing the injunction the court called attention to the rule that under the general principles of equity "an injunction will not usually be granted or continued where it will do more mischief and work greater injury than the wrong which it is asked to redress."

In Tennessee, Kansas, and Kentucky the courts have required members of associations to deliver their products thereto (although the holders of mortgages on the crops protested) where it appeared that the holders of the mortgages took them with notice that the members were under contract to deliver their products to the association for marketing.[10]

In a Nebraska case alleged mismanagement of the association was held to be no defense to a suit for an injunction.[11]

Under normal circumstances, the statutory provisions under discussion would appear to be virtually mandatory on the court concerned.

Prior to 1923 the Supreme Court of California refused to enjoin a producer from disposing of eggs outside the association because of a code provision which forbade the issuance of injunctions to restrain the violation of contracts that could not be enforced specifically.[12] A statute was enacted in California in 1923 specifically giving cooperative associations the right to the equitable remedies in question.[13] The courts of California have always upheld the right of cooperative associations to recover liquidated damages.[14]

The courts have frequently pointed out the reasons why a judgment in favor of an association for a definite amount of money would not adequately compensate it for the loss suffered through the failure of a member to deliver his products.[15] In the case last cited the court said:

> Judgment for the loss of the profits which would have accrued to the association solely from the resale of the products withheld by a breaching member would not necessarily measure the damages to the association. If one member may breach his contract with impunity, so might others. With each withdrawal a larger proportionate share of the expenses would fall upon the remaining members. It would be impossible to compute the losses which would thus progressively accrue to the association and its remaining members; nor would this diminution of the proportionate returns, if they could be computed, measure the full extent of the wrong to the association. The influence of the conduct of the breaching member would inevitably tend to promote further withdrawals and impair the ability of the association to secure new members. If indulged in by a sufficient number it would impair the effective existence of the association if, in fact, it did not bring about a dissolution. It is plain that an unrestrained breach of member contracts would produce irreparable injury to the association, and, through it, to each of the remaining members.

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[9] Tobacco Growers' Co-op. Ass'n *v.* Bland, 187 N. C. 356, 121 S. E. 636.

[10] Tobacco Growers' Co-op. Ass'n *v.* Dunn, 150 Tenn. 614, 266 S. W. 308; Kansas Wheat Growers' Ass'n *v.* Floyd et al. and Kansas Wheat Growers' Ass'n *v.* Robben et al., 116 Kan. 522, 227 P. 336; Redford et al. *v.* Burley Tobacco Growers' Co-op. Ass'n, 205 Ky. 515, 266 S. W. 24.

[11] Nebraska Wheat Growers' Ass'n *v.* Smith, 115 Neb. 177, 212 N. W. 39.

[12] Poultry Producers of Southern California, Inc., *v.* Barlow, 189 Cal. 278, 208 P. 93; Poultry Producers of Central California *v.* Murphy, 64 Cal. App. 450, 221 P. 962; Poultry Producers of Central California *v.* Nilsson, 197 Cal. 245, 239 P. 1086.

[13] Colma Vegetable Ass'n *v.* Bonetti, —— Cal. App. ——, 267 P. 172.

[14] See California cases cited above.

[15] Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kan. 672, 216 P. 311; Dark Tobacco Growers' Co-op. Ass'n *v* Dunn, 150 Tenn. 614, 266 S. W. 308; Manchester Dairy System, Inc., *v.* Hayward, 82 N. H. 193, 132 A. 12.

Owing to the need for prompt action, the law usually permits courts that exercise equity powers to issue a restraining order without notice to the defendant, upon the submission of a verified complaint, on its face showing applicant entitled thereto. On the issuance of a restraining order a copy of the complaint and order are served on the defendant, and he is notified of a date, usually an early one, on which he may show cause why he should not be enjoined. As a defendant or grower is usually enjoined before he has had an opportunity to be heard, an association, under the recent cooperative statutes,[16] and under the laws and principles generally applicable, must execute a bond to protect the grower in the event it should develop, on the hearing, that the court had acted improvidently.

In a Mississippi case [17] an association was held liable on its bond to the extent of $100, the amount thereof, because of the erroneous procurement by the association of an injunction.

In a Kentucky case [18] the restraining order issued by the court was dissolved on the final hearing. In the meantime the tobacco had been stolen. Suit was then brought on the bond, but the court found that the theft of the tobacco was not the natural and proximate result of the issuance of the restraining order and, hence, held that there could be no recovery on the bond.

The terms of an injunction order should not be broader than the obligation of the member.[19]

A failure to comply with an injunction order or a decree for the specific performance of a contract causes the grower concerned to be in contempt of court, for which the court may fine the grower or send him to jail. It is the authority of a court to fine the grower involved or send him to jail that gives force to its orders.

INTERFERENCE WITH MARKETING CONTRACTS

What may cooperative associations do to prevent third persons from causing their members to breach their contracts?

Independent of statute "it has been repeatedly held that, if one maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer for damages." [20] In addition, in appropriate cases, associations may enjoin persons who are inducing their members to breach their contracts.

In a Wisconsin case,[21] in which a cooperative association enjoined a dealer in tobacco who actively and intentionally tried to induce members of the association to break their contracts, the supreme court of that State said: "We consider the law settled that one who maliciously induces another to break a contract with a third person is liable to such third person for the damages resulting from such breach."

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[16] See paragraph (b) of section 18 of the Bingham Cooperative Marketing Act of Kentucky on p. 123 of appendix.

[17] Staple Cotton Co-op. Ass'n *v.* Borodofsky, 143 Miss. 558, 108 So. 807; see also Garden Plain Farmers E. Co. *v.* Kansas Wheat Growers' Ass'n, —— Kan. ——, 276 P. 799.

[18] Burley Tobacco Growers' Co-op. Ass'n *v.* Pennebaker Home for Girls, —— Ky. ——. 299 S. W. 734.

[19] Pierce County Dairymen's Ass'n *v.* Templin, 124 Wash. 567, 215 P. 352.

[20] Monte Vista Potato Growers' Co-op. Ass'n *v.* Bond et al., 80 Colo. 516, 252 P. 813; Angle *v.* Chicago, St. Paul, Minneapolis and Omaha Railway Co., 151 U. S. 1; Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md. 556, 69 A. 405, 16 L. R. A. (N. S.), 746; Wheeler-Stenzel Co. *v.* American Window Glass Co., 202 Mass. 471, 89 N. E. 82, L. R. A. 1915F 1075; Aalfo Co., Inc., *v.* Kinney et al., —— N. J. ——, 144 A. 715.

[21] Northern Wisconsin Co-op. Tobacco Pool *v.* Bekkedal, 182 Wis. 571, 197 N. W. 936; see also Phez. Co. *v.* Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970, 25 A. L. R. 1090; Monte Vista Potato Growers' Co-op. Ass'n *v.* Bond et al., 80 Colo. 516, 252 P. 813; Wilson *v.* Monte Vista Potato Growers' Co-op. Ass'n, 82 Colo. 428, 260 P. 1080.

In a Texas case [22] and in a North Carolina case [23] suits were brought by the associations involved against members and dealers who were handling or offering to handle their products with knowledge of the fact that the products were covered by contracts with the association, and in each of these cases the members were enjoined from disposing of their products outside the association and the dealers were enjoined from interfering with the performance of the contracts. The cooperative cases cited above were all decided under the general principles of equity and independent of statutory provisions.

In addition to the right which an association has in an appropriate case to enjoin interference with its contracts, or to recover damages from persons doing so, in pursuance of equity or common-law principles, provisions have been included in many of the statutes providing for the formation of cooperative associations which make it a misdemeanor knowingly to induce the breach of a marketing contract and which authorize associations to recover a penalty of $500 for each such offense.[24] Sections 26 and 27 of the Bingham Cooperative Marketing Act of Kentucky were upheld by the Supreme Court of the United States [25] in a case arising in Kentucky,[26] in which the Burley Tobacco Growers' Cooperative Association recovered a penalty of $500 from a warehouse company that sold tobacco that was covered by a marketing contract of the association. "Before the sale the association notified the warehouse company of Kielman's membership and of his marketing contract, requested it not to sell his tobacco, and called attention to the prescribed penalties." Similar provisions in the cooperative act of Colorado were upheld by the supreme court of that State.[27]

The Supreme Court of Minnesota held that a similar penalty section in one of the cooperative statutes of that State was unconstitutional as violating the freedom of contract provisions in the State and Federal Constitutions.[28] In reaching this conclusion, the court said:

> Of course, it is well settled that a malicious interference by one not a party to a contract to induce its breach is a tort for which redress may be had. * * * But section 27 does not stop with those who maliciously interfere with existing contracts between third parties. * * * In other words, the section attempts to prevent all dealings between members of a cooperative marketing association and outsiders in respect to products contracted for by the association, no matter how free from legal malice or devoid of inducements the conduct of the outsiders may have been, provided they knew that the product was under contract.

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[22] Hollingsworth *v.* Texas Hay Ass'n (Tex. Civ. App.), 246 S. W. 1068.

[23] Tobacco Growers' Co-op. Ass'n *v.* Pollock, 187 N. C. 409, 121 S. E. 763.

[24] See secs. 26 and 27 of the Bingham Cooperative Marketing Act of Kentucky on pp. 124 and 125 in appendix.

[25] Liberty Warehouse Co. *v.* Burley Tobacco Growers' Co-op. Marketing Ass'n, 276 U. S. 71, 48 S. Ct. 291.

[26] Liberty Warehouse Co. *v.* Burley Tobacco Growers' Co-op. Marketing Ass'n, 208 Ky. 643, 271 S. W. 695.

[27] Fort *v.* People ex rel. Co-op. Farmers' Exchange, 81 Colo. 420, 256 P. 319.

[28] Minnesota Wheat Growers' Co-op. Marketing Ass'n *v.* Radke, 163 Minn. 403, 204 N. W. 314.

In a Colorado case[29] a competitor of a cooperative inserted advertisements in a local paper relative to the decline in the price of cabbage. As the statements in these advertisements were held apparently to be simply an honest expression of opinion, it was held that they did not violate an injunction order which, among other things, forbade interference with "any of the business of the exchange." In other words, the court held that the injunction order quoted was too broad or that it should be confined to instances of illegal interference. In an Oregon case,[30] in which the members of a cooperative association had disabled the association from fulfilling a contract which it had made with a buyer of loganberries by failing or refusing to deliver their loganberries to the association for marketing, the court held that the buyer had a cause of action against the association and against the members, because they had prevented the association from performing its contract.

Virginia[31] and Kentucky[32] have enacted statutes, sometimes referred to as "True Name Laws," that require warehousemen to keep records showing the true names of the owners of tobacco they had for sale, and permitting the inspection of such records. It was claimed by opponents of this legislation that the object of the statutes was to enable cooperative associations to ascertain if their members were disposing of tobacco to others. These statutes have been upheld.[33]

TRANSFERS IN ATTEMPTS TO AVOID CONTRACTS

Attempts have been made by members of cooperative associations to "transfer" their farms and thus avoid their marketing contracts through conducting their farming operations in the names of their wives or other persons. The courts have repeatedly declared that marketing contracts may not be avoided in this way. The real test in cases of this character depends upon whether the transfer involved was one in fact, or one in form only.

In other words, was the transfer simply a colorable transaction or a transfer in good faith? If subsequent to the alleged transfer, the farming operations were conducted in substance the same as they were before the transfer, then the courts hold the transfer ineffective,[34] and the crops grown are subject to the marketing contract. On the other hand, if the farming operations subsequent to the transfer are in fact conducted by the wife of a member, as was done in a Virginia case, in which the wife leased a farm from a third person and supervised its operations, then the crops grown are not subject to a marketing contract signed by the husband.[35]

In Kentucky, a transfer of land by a member of an association to his wife and son, although made for a valuable consideration, was held void under a statute of that State declaring fraudulent all conveyances of real or personal property made to delay creditors and others, where the person to whom the transfer is made has notice of the fraudulent intent of the person making the transfer.[36] In this case the association recovered liquidated damages of 5 cents per pound for all tobacco grown on the farm in question and disposed of outside of the association.

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[29] Fort *v.* People ex rel. Co-op. Farmers' Exchange, 81 Colo. 420, 256 P. 325.

[30] Phez Co. *v.* Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970.

[31] 1923 Laws of Virginia, ch. 109.

[32] 1924 Acts of Kentucky, ch. 10.

[33] Reaves Warehouse Corporation *v.* Commonwealth, 141 Va. 194, 126 S. E. 87; Motley et al. *v.* Commonwealth, 141 Va. 194, 126 S. E. 87; Danville Warehouse Co., Inc., *v.* Tobacco Growers' Co-op. Ass'n, 143 Va. 741, 129 S. E. 739; Jewell Tobacco Warehouse Co. *v.* Kemper, 206 Ky. 667, 268 S. W. 324.

[34] Burley Tobacco Growers' Co-op. Ass'n *v.* Devine, 217 Ky. 320, 289 S. W. 253; Dark Tobacco Growers' Co-op. Ass'n *v.* Alexander, 208 Ky. 572, 271 S. W. 677; South Carolina Cotton Growers' Co-op. Ass'n *v.* English, 135 S. C. 19, 133 S. E. 542; Oregon Growers' Co-op. Ass'n *v.* Lentz, 107 Or. 561, 212 P. 811; Kansas Wheat Growers' Ass'n *v.* Lucas, 124 Kan. 773, 262 P. 551.

[35] Layne *v.* Tobacco Growers' Co-op. Ass'n, —— Va. ——, 133 S. E. 358; see also Inland Empire Dairy Producers' Ass'n *v.* Melander et ux., 134 Wash. 145, 235 P. 12; Inland Empire Dairy Producers' Ass'n *v.* Casberg et ux., 134 Wash. 702, 235 P. 13; Burley Tobacco Growers' Co-op. Ass'n *v.* Jewell, 213 Ky. 272, 280 S. W. 1105.

CONCLUSIVE PRESUMPTION

A number of the cooperative statutes that have been enacted during the last few years contain a provision [37] stating that "it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others" whose tenancy is created after the execution of a marketing contract. This provision in the cooperative acts of Kentucky and Colorado has been upheld by the courts of those States.[38] In the Kentucky cases just cited the association recovered liquidated damages from the landlord on account of products grown on his land which were not marketed through the association.

In the two Colorado cases just cited the court held that the association was entitled to enjoin the landlord and the tenant in each case, and to recover damages from each of them. In each of the Colorado cases, the tenant knew that the landlord was a member of the association, and the court held that he was charged with notice of the conclusive presumption provision in the cooperative act of Colorado.

The conclusive-presumption provision in the cooperative act of Louisiana was held to be in conflict with the fourteenth amendment to the Federal Constitution by the supreme court of that State.[39]

In the case first cited above, the association sought to compel the specific performance of a contract and to recover liquidated damages for cotton sold outside the association. The cotton had been grown on the share-lease plan and the tenants were not parties to the suit. From the record it did not appear that the "tenants had any knowledge of the marketing agreement of their landlord with said association." The court declared that the legislature had "made an indirect but clear attempt to deprive tenants of their property in cotton raised under the share system of contract, without notice of such marketing contract, and without due process of law of any kind." Although all persons are charged with knowledge of the law, persons are not charged with knowledge of the membership of cooperative associations or with knowledge of the persons that have entered into marketing contracts with an association.

In a Mississippi case,[40] the court expressed doubt concerning the constitutionality of the conclusive presumption provision and held that it had no application to a marketing contract entered into prior to the passage of the cooperative statute containing the provision.

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[36] Coyle *v.* Dark Tobacco Growers' Co-op. Ass'n, 213 Ky. 272, 277 S. W. 318.

[37] See sec. 18 of the Bingham Cooperative Marketing Act of Kentucky on p. 123 in appendix.

[38] Feagain *v.* Dark Tobacco Growers' Co-op. Ass'n, 202 Ky. 801, 261 S. W. 607; Dark Tobacco Growers' Co-op. Ass'n *v.* Daniels, 215 Ky. 67, 284 S. W. 399; Monte Vista Potato Growers' Co-op. Ass'n *v.* Bond, 80 Colo. 516, 252 P. 813; Wilson *v.* Monte Vista Potato Growers' Co-op. Ass'n, 82 Colo. 428, 260 P. 1080.

[39] Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n *v.* Clark, 160 La. 294, 107 So. 115; Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n *v.* Bannister, 161 La. 958, 109 So. 776; Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n *v.* Bacon, 164 La. 126, 113 So. 790.

[40] Staple Cotton Co-op. Ass'n *v.* Hemphill, —— Miss. ——, 107 So. 24.

MONOPOLY—RESTRAINT OF TRADE

To understand clearly the attitude of the courts toward early cooperative efforts in this country, it is important to have in mind the legal background with respect to monopolies and restraint of trade. For centuries the common law looked askance at anything that appeared to restrain trade or to reduce competition. One could hardly overemphasize the attitude of the early English courts with respect to these matters. Bona fide partnerships were apparently always held to be lawful, although the formation of a partnership might mean a reduction of one or more in the number of traders or dealers.

The common-law attitude toward restraint of trade is illustrated by a Washington case [41] involving an association of milk dealers of the City of Seattle, which fixed the price of milk and through which the dealers agreed not to sell to each others' customers. The milk dealers were prosecuted and found guilty of conspiracy under common-law principles.

It was held at early common law that if a man sold his business and entered into an agreement with the purchaser that he would not engage in the same business either at that place or any other place, or within a given area for a given period of time, or at any time, the agreement was illegal on the theory that it reduced the opportunities of the seller for making a living.[42]

Gradually the attitude of the courts toward contracts of this kind relaxed, and to-day they are upheld generally, if the restrictions on the right of the seller to engage in business are no greater than is reasonably necessary for the protection of the buyer.[43]

Further light is thrown on the state of the law towards acts deemed to be in restraint of trade by the statute passed by the English Parliament in the reign of Edward VI prohibiting forestalling, engrossing, and regrating.[44]

Forestalling consists of buying victuals on their way to market and before they reach it, with intent to sell again at a higher price.[45]

Engrossing was the buying at any place of certain necessities of life from producers with a view to resale at a higher price. Regrating was the purchase of provisions at a fair or public market for the purpose of resale at a higher price in the same market or in any market within 4 miles thereof. This early English statute restricting trading in victuals and provisions evidences the intention that such products should pass from the original producer to the consumer. In other words, the object of the statute was undoubtedly to keep the bridge short between the producer and the consumer. This statute against forestalling, engrossing, and regrating, as well as the other principles with reference to restraint of trade referred to all became a part of the common law of this country to a large degree,[46] and this should be kept in mind when considering the attitude of American courts towards early cooperative efforts in this country.

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[41] State *v.* Erickson, 54 Wash. 472, 103 P. 796.

[42] Anson on Contracts, Am. Ed., sec. 255.

[43] Lumbermen's Trust Co. *v.* Title Ins. & Inv. Co. of Tacoma, 248 F. 212.

[44] Stats. at Large. 7 Edw. VI. v. 5. ch. 14.

[45] Dutton *v.* City of Knoxville, 121 Tenn. 25, 113 S. W. 381, 383, 130 Am. St. Rep. 748, 16 Ann. Cas. 1028.

Perhaps because of a change in economic and social conditions and perhaps because of the demonstrated inefficiency of such a statute, it was repealed partly in 1772 and completely in 1844.[47]

It is interesting that the statute enacted in 1844 by the English Parliament, which included the repeal of the statute against forestalling, engrossing, and regrating, stated that it was being repealed because the prohibited acts had come to be considered as favorable to the development of trade and not as restraining trade.

From the foregoing it is clear that we inherited common-law principles and traditions against restraint of trade.

Some of the cases involving cooperative associations that were decided in States prior to the enactment of cooperative statutes in the States concerned will now be discussed.

An Iowa case, decided in 1913, involving a cooperative association, was disposed of in accordance with what the court conceived to be the common-law principles applicable. A by-law of the association provided that any member of the association should forfeit 5 cents for every hundredweight of produce or livestock sold to any competitor of the association. A buyer of hogs, who operated in the territory in which the association functioned, brought an injunction suit to prevent the association from enforcing the by-law. In holding against the association, the Supreme Court of Iowa held that the by-law was in restraint of trade because the plaintiff was placed at a disadvantage and could not compete with the society in purchasing hogs from its members, and the members were not free to deal with plaintiff. If they dealt with him, he either forfeited his profits by reason of having to pay too much for his hogs, or they forfeited a part of the purchase price as a penalty for selling to him.[48]

In a Colorado case[49] a by-law provided that stockholders might sell grain to competitors of the association in a particular town by paying one cent per bushel to the association for all grain so sold. A stockholder who had agreed to the by-law sold 3,500 bushels of grain to a competitor of the association and it brought suit against him to recover $35. The by-law was held invalid on the ground that it was in restraint of competition and the association lost the suit.

It is interesting that the Colorado cases followed the Iowa cases. Other cases in which the courts held against the cooperative associations involved, on the ground that they were operating in restraint of trade, are here given.[50]

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[46] State *v.* Eastern Coal Co., 29 R. I. 254, 70 A. 1, 132 Am. St. Rep. 817, 17 Ann. Cas. 96.

[47] Standard Oil Co. of New Jersey *v.* United States, 221 U. S. 1, 55.

[48] Reeves *v.* Decorah Farmers' Co-operative Society, 160 Iowa 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104; followed in Ludowese *v.* Farmers' Mut. Co-op. Co., 164 Iowa 197, 145 N. W. 475.

[49] Burns *v.* Wray Farmers' Grain Co., 65 Colo. 425, 176 P. 487; followed in Atkinson et al. *v.* Colorado Wheat Growers' Ass'n, 77 Colo. 559, 238 P. 1117.

[50] Georgia Fruit Exchange *v.* Turnipseed (1913), 9 Ala. App. 123, 62 So. 542; Ford *v.* Chicago Milk Shippers' Ass'n (1895), 46 Ill. App. 576, 27 L. R. A. 298, 39 N. E. 651.

In each of the States in which decisions were rendered that were adverse to cooperation, later cases have been decided favorably to cooperation. In Iowa[51] the supreme court of that State upheld the right of an association formed under the cooperative act passed in 1921, which provided that associations formed under it might provide for liquidated damages in their contracts. In upholding the liquidated-damages clause in the contract of the association and the validity of the association in general, the court apparently was of the opinion that the association was legal at common law, but in response to the argument that the cooperative act under which the association was organized violated an earlier statute of the State prohibiting pools and trusts, in that it authorized associations to provide for liquidated damages, the court said that the cooperative act "is as much a declaration of public policy as the earlier statute referring to pools and trusts."

In Colorado the supreme court of that State in upholding cooperative associations held that the public policy of the State had been expressly changed by the cooperative act enacted in 1923.[52]

In Illinois, New York and Alabama[53] it was held, apparently in pursuance of common-law principles, that the associations involved were not operating in restraint of trade even though their contracts, or by-laws, provided for liquidated damages.

Not all of the early cases involving cooperation were adverse to the associations concerned. In Indiana[54] the supreme court of that State, applying common-law principles, upheld the cooperative association and held that it was not operating in restraint of trade.

Nearly all of the States, comparatively early in their history, included provisions in their constitutions or statutes against monopolies, trusts, and restraint of trade. Efforts were made to except cooperative associations of farmers from these prohibitions, either by including an exception in the statute or by a provision in the constitution. For instance, in 1893, the State of Illinois passed an antitrust act, which declared that "the provisions of this act shall not apply to agricultural products while in the hands of the producer or raiser." This provision was later made the basis for a decision by the Supreme Court of the United States in the famous Connolly case.[55]

Briefly, the facts in the case were these: Connolly was indebted to the Union Sewer Pipe Co. on two notes given on account of the purchase by him of some sewer pipe. When sued on the notes, Connolly claimed that the plaintiff was a trust, and as the antitrust act specifically stated that any purchaser of any article from any corporation operating as a trust was not liable for the purchase price, that he could not be held for the purchase price of the pipe. The Sewer Pipe Co. claimed that the antitrust act of Illinois was void because it exempted products in the hands of the producer, which exemption, it contended, violated the fourteenth amendment to the Constitution, to wit, the equal-protection clause. The Federal district court, in which it originated, held that this was true, and the Supreme Court of the United States affirmed the decision.

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[51] Clear Lake Co-op. Live Stock Shippers' Ass'n *v.* Weir, 200 Iowa 1293, 206 N. W. 297.

[52] Rifle Potato Growers' Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937; Austin *v.* Colorado Dairymen's Co-op. Ass'n, 81 Colo. 546, 256 P. 640.

[53] Milk Producers' Marketing Co. *v.* Bell, 234 Ill. App. 222; Bullville Milk Producers' Ass'n *v.* Armstrong, 178 N. Y. S. 612; Castorland Milk and Cheese Co. *v.* Shantz, 179 N. Y. S. 139; Ex parte Baldwin County Producers' Corporation, 203 Ala. 345, 83 So. 69.

[54] Burley Tobacco Society *v.* Gillaspy, 51 Ind. App. 583, 109 N. E. 89 (1912).

[55] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 541; a similar conclusion was reached in Georgia in a like case, Brown & Allen *v.* Jacobs' Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547.

In 1889, Texas enacted an antitrust act which contained language exempting agriculture identical with that contained in the Illinois act. The legality of this provision in the Texas act was questioned in a Federal court, which held that it violated the equal-protection clause in the fourteenth amendment.[56]

The effect of the decision by the Supreme Court of the United States in the Connolly case and of the lower Federal court in the Texas case was to invalidate the antitrust statutes of each of the States, assuming that the court decisions in question are given full force and effect. On reflection it will be appreciated that this conclusion is distinctly different from holding that farmers are barred from forming cooperative associations. On the contrary, the effect of the decisions referred to, and of any other similar decisions that might be rendered, is merely to leave a State without any antitrust legislation. It is believed that the decision of the United States Supreme Court, rendered in 1928, in a case involving the Burley Tobacco Growers' Cooperative Association indicates a change of attitude on the part of that court toward the right of States to provide expressly for the organization of cooperative associations.[57]

The so-called standard marketing act contains a provision[58] stating that associations organized thereunder:

> * * * Shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreement authorized in this act shall be considered not to be illegal nor in restraint of trade. * * *

This form of statute has been enacted in more or less the same form in 42 States. Not all of the forms of this statute that have been enacted by the various States contain this provision.

In a Texas case [59] decided by an intermediate court, it appeared that producers began the formation of an association with the intention of incorporating under the cooperative act of Texas; but they failed to incorporate, and later sought to enjoin a member from violating his contract. The court held that the contract of the association violated the antitrust act of the State, but it also held that if the association had been incorporated under the cooperative act of Texas it would have been exempt from the antitrust act by reason of the exemption language contained in the act.

Many large-scale cooperative associations have been formed in various States under the standard marketing act. The validity of this statute and the legality of the associations formed under it, and especially whether the associations were monopolies or restraining trade, have been repeatedly before the courts.[60]

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[56] In re Grice, 79 F. 627, (1897).

[57] Liberty Warehouse Co. *v.* Burley Tobacco Growers' Co-op. Marketing Ass'n, 276 U. S. 71, 48 S. Ct. 291.

[58] See sec. 28 of the Bingham Cooperative Marketing Act of Kentucky on p. 125 of appendix.

[59] Fisher *v.* El Paso Egg Producers' Ass'n (Tex. Civ. App.), 278 S. W. 262.

The exact basis for the conclusion of the court in each instance that the association involved was not a monopoly or was not engaged in restraint of trade from a legal standpoint, varies, but all the cases, either expressly [61] or by implication [62] hold that the public policy of the State has been changed so as to render legal associations which, under old standards, would have been regarded as illegal. This line of reasoning appears to be correct in all instances in which a State has enacted a statute, or statutes, providing for the incorporation and organization of associations of farmers.

Clearly, if a State has enacted a statute providing for the incorporation of associations of producers and authorizing such associations to enter into contracts with their members covering the handling and marketing of their produce, such a statute should take precedence over a prior statute of the State against trusts and restraint of trade. It should be remembered that all of the statutes that have been enacted during the last few years for the incorporation and operation of cooperative associations of producers were enacted subsequent to the statutes against monopolies and restraint of trade of the States in question. The last statute is an expression of the legislature of the State of equal rank with the earlier expression of the State legislature, and the fact that it is of later date causes it to supersede or to modify, in so far as this is necessary, the earlier statute against restraint of trade.[63]

This is true whether or not the cooperative act under which the association is formed contains a provision declaring that the associations formed thereunder are not to be deemed to be in restraint of trade. In fact, the courts in many of the cases that have been decided under cooperative statutes containing this exemption clause have not referred in their opinions to this provision.

In some instances cases have arisen in which the antitrust prohibitions of the State were contained in its constitution. Of course, in instances of this kind, it was necessary for the court to find that the association was not, in fact, within the scope of this provision of the constitution.[64]

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[60] Tobacco Growers' Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231 (1923); Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kan. 672, 216 P. 311 (1923); Oregon Growers' Co-op. Ass'n *v.* Lentz, 107 Or. 561, 212 P. 811 (1923); Brown *v.* Staple Cotton Co-op. Ass'n, 132 Miss. 859, 96 So. 849 (1923); Northern Wisconsin Co-op. Tobacco Pool *v.* Bekkedal, 182 Wis. 571, 197 N. W. 936 (1924); Dark Tobacco Growers' Co-op Ass'n *v.* Dunn, 150 Tenn. 614, 266 S. W. 308 (1924); Potter *v.* Dark Tobacco Growers' Co-op Ass'n, 201 Ky. 441, 257 S. W. 33 (1923); Colma Vegetable Ass'n *v.* Bonetti, —— Cal. App. ——, 267 P. 172; Dark Tobacco Growers' Co-op. Ass'n *v.* Mason, 150 Tenn. 228, 263 S. W. 60 (1924); Minnesota Wheat Growers' Co-op. Ass'n *v.* Huggins, 162 Minn. 471, 203 N. W. 420 (1925); List *v.* Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. 361, 151 N. E. 471 (1926); Washington Cranberry Growers' Ass'n *v.* Moore, 117 Wash. 430, 201 P. 773, 204 P. 811 (1921); Phez Co. v. Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970; Burley Tobacco Growers' Co-op. Ass'n *v.* Rogers, —— Ind. ——, 150 N. E. 384 (1926); Nebraska Wheat Growers' Ass'n *v.* Norquest, 113 Neb. 731, 204 N. W. 798 (1925); Clear Lake Co-op. Live Stock Shippers' Ass'n *v.* Weir, 200 Iowa 1293, 206 N. W. 297 (1925); Lee *v.* Clearwater Growers' Ass'n, —— Fla. ——, 111 So. 722 (1927); Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937 (1925).

[61] Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937; Northern Wisconsin Co-op. Tobacco Pool *v.* Bekkedal, 182 Wis. 571, 197 N. W. 936; Kansas Wheat Growers' Ass'n *v.* Schulte, 113 Kans. 672, 216 P. 311.

[62] Brown *v.* Staple Cotton Co-op. Ass'n, 132 Miss. 859, 96 So. 849; List *v.* Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. 361, 151 N. E. 471.

[63] Rifle Potato Growers' Co-op. Ass'n *v.* Smith, 78 Colo. 171, 240 P. 937; Northern Wisconsin Co-op. Tobacco Pool *v.* Bekkedal, 182 Wis. 511, 197 N. W. 936; Clear Lake Co-op. Live Stock Shippers' Ass'n *v.* Weir, 200 Iowa 1293, 206 N. W. 297.

[64] Brown *v.* Staple Cotton Co-op. Ass'n, 132 Miss. 859, 96 So. 849.

In a few instances the courts have attached some significance to the fact that the association was formed under a cooperative statute that contained a provision in effect expressly exempting associations formed thereunder from the antitrust laws of the State.[65]

In 1890 the Sherman Anti-Trust Act[66] was passed by Congress, the first section of which reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

In construing this statute the United States Supreme Court has repeatedly held that only unreasonable restraints are prohibited thereby.[67]

In the cases last cited the Supreme Court announced the so-called "rule of reason." It is now settled that under the Federal antitrust acts the courts will look largely to how a defendant employs its power and strength, and the legality of a large industrial unit depends on its acts and conduct and not on its size. During the past decade and more, courts have shown an increasingly liberal attitude toward large-scale organizations. Bigness which has come about through development along normal lines and without unfair practices or wrongful acts does not constitute illegality.

In the case of the United States *v.* United States Steel Corporation,[68] the legality of this corporation, a combination of approximately 180 separate units, was involved, but the court applied the principles referred to, and although the corporation controlled 50 per cent of the steel industry of the United States it was held not to be in restraint of trade.

In the case of the Chicago Board of Trade *v.* United States[69] the legality of a rule adopted by the Board of Trade of Chicago which prohibited its members from purchasing or offering to purchase, during the period between the session of the board termed the "call" and the opening of the regular session of the next business day, grain "to arrive" at a price other than the closing bid at the "call" was held not to violate the Sherman Act. In this case it was said, "The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."

A case which well illustrates the "rule of reason" is that of the National Window Glass Manufacturers *v.* United States,[70] in which the Supreme Court of the United States passed upon a situation in which all the manufacturers of hand-blown glass and all the labor

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[65] Lee *v.* Clearwater Growers' Ass'n, —— Fla. ——, 111 So. 722; Tobacco Growers' Co-op. Ass'n *v.* Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231.

[66] 26 Stat. 209, U. S. Comp. Stat. sec. 8820.

[67] Standard Oil Co. of New Jersey *v.* United States, 221 U. S. 1; United States *v.* American Tobacco Co., 221 U. S. 106.

[68] United States *v.* United States Steel Corporation et al., 251 U. S. 417.

[69] Board of Trade of the City of Chicago et al. *v.* United States, 246 U. S. 231.

[70] National Association of Window Glass Manufacturers *v.* United States, 263 U. S. 403.

(union) to be had for this work entered into an arrangement under which it was agreed that certain of the factories *only* would operate for a specified period during which all the labor would be employed by those factories; then, during another specified period, the remainder of the factories would operate with all of the labor, and the other factories would not then operate. In view of all the facts involved, it was held that there was no violation of the law. It is true that the court referred to the fact that the price of glass was virtually determined by those engaged in the manufacture of machine-blown glass, but the fact remains that an economic arrangement, involving the complete closing of certain factories during a specified period and the operation of only certain other factories during that period, was upheld.

The Supreme Court has also declared that those engaged in the same line of business may, through their trade associations, freely exchange information regarding goods on hand, the amount of unfilled orders, and the prices at which sales have been made.[71]

The court has, however, refused to apply the " rule of reason " in instances in which manufacturers of the same product have agreed upon a schedule of prices.[72] In cases of this character the court regards the fixing of prices as in itself a violation of the Sherman Act and will not inquire into the reasonableness of such prices.

The act of Congress[73] approved July 2, 1926, directing the Secretary of Agriculture to establish a division of cooperative marketing in the Department of Agriculture contains a provision reading as follows:

> Persons engaged, as original producers of agricultural products, as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.

This provision confers broad authority on producers and their associations to acquire and exchange information pertaining to the production and marketing of crops.

SECTION 6 OF THE CLAYTON ACT

Following the passage of the Sherman Act, as larger and larger cooperative marketing and bargaining associations of producers were formed, the question of the application of the Sherman Act to such associations claimed the attention of agricultural leaders. In order to clarify the situation, when the Clayton Act[74] was enacted in 1914, language was included in section 6 thereof with reference to the status of organizations of farmers. This section reads as follows:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations,

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[71] Maple Flooring Manufacturers' Ass'n *v.* United States, 268 U. S. 563; Cement Manufacturers' Protective Ass'n *v.* United States, 268 U. S. 588.

[72] United States *v.* Trenton Potteries Co., 273 U. S. 392.

[73] 44 Stat., p. 803.

[74] 38 Stat. 731, U. S. Comp. Stat., sec. 1243a.

> instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

It seems to be generally agreed that this section would appear to prevent the dissolution of an organization which meets the conditions it prescribes, namely, that it is a "labor, agricultural, or horticultural organization;" that it is "instituted for the purposes of mutual help," and does not have "capital stock;" and last, is not "conducted for profit." However, the few decisions of the courts relative to this section indicate that it does not enable them, if they desire, to adopt methods of conducting their operations denied to other lawful business organizations. In a case [75] decided by the Supreme Court involving the legality of a secondary boycott by a labor organization it was said:

> As to [section] 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws.

In a certain case,[76] the Aroostook Potato Shippers' Association, acting through a committee, blacklisted certain buyers of potatoes. Members of the association were forbidden, under penalty, to deal with such buyers. Persons outside the association who dealt with persons so blacklisted were also blacklisted and boycotted. The defendants, members of the association, were indicted for a conspiracy in restraint of trade and were fined. The court said with reference to the contention that section 6 relieved the defendants:

> * * * I do not think that the coercion of outsiders by a secondary boycott, which was discussed in my opinion on the former indictment, can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.

Section 6 of the Clayton Act is still in effect and is not repealed by the Capper-Volstead Act.

CAPPER-VOLSTEAD ACT

The Capper-Volstead Act became a law on February 18, 1922. It is entitled "An act to authorize association of producers of agricultural products," and reads as follows:

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[75] Duplex Printing Press Co. *v.* Deering, 254 U. S. 443; Buyer *v.* Guillan, 271 F. 65.

[76] United States *v.* King, 229 F. 275, 250 F. 908.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

Sec. 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association, or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other cases.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.[a]

Section 6 of the Clayton Act refers only to nonstock organizations, so that an association of producers formed with capital stock would not be entitled to the benefits thereof. Owing to this fact and for the further purpose of making the status of associations of producers under the Federal antitrust laws more clear than was done by section 6 of the Clayton Act, the Capper-Volstead Act was passed.

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[a] 42 Stat. at Large 388.

The reports of the committees of Congress that reported out the measure and the debates in Congress with reference thereto show that it was the intention of Congress that the Capper-Volstead Act should exempt associations of farmers, when they operate along normal business lines, from the Federal antitrust statutes. In other words, the fact that an association that meets the conditions of the act controls the handling and marketing of all of a given agricultural product would not of itself, standing alone, cause the organization to be in violation of such statutes, and the restraint of trade caused thereby would not cause the association to violate the law.

Moreover, it should be remembered that the Capper-Volstead Act was passed subsequent to the antitrust statutes and in so far as there is any conflict it should control. An association that meets the conditions of the Capper-Volstead Act is not free to engage in any course of conduct which it might see fit to adopt. For instance, if it should engage in unfair competition, that would subject it to the jurisdiction conferred upon the Federal Trade Commission by the act[77] creating it. Again, abnormal conduct on the part of an association might subject it to the jurisdiction of the Department of Justice of the United States for a violation of the antitrust laws.

So far as the price at which an association offers its products for sale is concerned, its reasonableness, if a question with reference thereto should arise, is to be determined by the Secretary of Agriculture. If he "shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby," he may, following a hearing, issue an order directing such association to cease and desist from monopolization or restraint of trade.

This act has no application to purely purchasing associations or to cooperative stores, for the reason that it relates only to associations that are composed of farmers, planters, ranchmen, dairymen, nut or fruit growers who are engaged in collectively processing, preparing for marketing, handling, and marketing in interstate and foreign commerce the products of persons so engaged, and then only with such associations as have complied with the conditions of the statute.

The question of whether an association is liable for income taxes is one that is not resolved by this act. Whether an association is liable for income taxes is to be determined by the income-tax statutes and the regulations issued under them.

This act does not provide for the incorporation of cooperative associations, and it makes no provision for their formation. Those interested in organizing or incorporating such associations should look to the laws of their respective States relating thereto.

Congress, under the Constitution, has control over interstate and foreign commerce, and this act deals only with the operations of cooperative associations in such commerce, and then only with such associations as comply with certain conditions prescribed therein.

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[77] 38 Stat. 717.

The test which those interested in an association should apply, to learn if their association comes within the scope of the act, is: Does the association meet the conditions set forth therein? These conditions are as follows:

A. "That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce such products of persons so engaged."

This and other language which appears in the act makes it plain that a cooperative association, to come within the act, must be composed of producers. Probably, in those isolated instances in which nonproducers become members of an association through inheritance or otherwise by operation of law contrary to the policy of the association, or in which producers cease to be such, the association being one which is incontrovertibly controlled and dominated by its producer members, would not, because of such nonproducer members, if it otherwise complied with the terms of the act, fall without its provisions. Such an association should take such measures as are compatible with law to eliminate and exclude voting nonproducers from membership. This is true, whether it is incorporated or unincorporated, and whether it is organized with or without capital stock.

B. Associations that desire to come within the act must be operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: First, that no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or, second, that the association does not pay dividends on stock and membership capital in excess of 8 per cent per annum. And in any case to the following: Third, that the association shall not deal in products of nonmembers to an amount greater in value than such as are handled by it for members.

Associations must comply with either the first or second condition and may comply with both. As the first condition embodies the one-man one-vote principle, associations operating on this basis, or which elect to operate on this basis, need not, unless they wish to do so, give consideration to the second condition. Of course, an association, if it desires, may operate in accordance with both of these conditions, but it will come within the scope of the act by complying with only one of them, if it complies with the other conditions of the act.

If an association elects to operate under the second condition, dividends on stock or membership capital are limited to 8 per cent per annum. This does not mean that voting stock may be owned by or sold to nonproducers so far as this act is concerned. Only associations whose voting stock is held by or whose membership is made up of producers can come within the act. It is not necessary for associations that operate under the act to pay dividends in any amount unless they elect to do so. It is entirely a matter of choice with them. If, however, an association elects to operate under the second condition, dividends, if paid, must not exceed 8 per cent per annum.

All associations that wish to operate under the act must meet the third condition, which is that the value of the products handled for nonmembers shall not exceed the value of those handled for members. This condition does not mean that an association must handle any business for nonmembers. It may do so or not, as it sees fit. If it does handle such business, however, the act specifically provides that the value of the products handled for nonmembers must not exceed the value of the products handled for members.

Under section 2 of the act it is the duty of the Secretary of Agriculture, if he believes that any association operating under it monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason of such monopoly or restraint of trade, to serve upon such association a complaint with respect to such matters, requiring the association to show cause why an order should not be issued directing it to cease and desist from monopolization or restraint of trade. After a hearing, if the Secretary of Agriculture believes that such an association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, the act provides that he shall issue an order reciting the facts found by him and directing such association to cease and desist from monopolization or restraint of trade. If such order is not complied with by the association within 30 days, the Secretary of Agriculture is then required to file a certified copy of the order issued by him, together with certified copies of all records in the matter, in the District Court of the United States in the judicial district in which such association has its principal place of business. The Department of Justice has charge, under the act, of the enforcement of such order. The District Court of the United States is given jurisdiction to affirm, modify, or set aside the order or to enter such other decree as it may deem equitable.

CLASSIFICATION OF AGRICULTURE

The classification which the Capper-Volstead Act makes by excepting producers' associations from the antitrust laws to the extent heretofore indicated appears to be founded on a real distinction and to be entirely reasonable. Agriculture is fundamentally different from industry. The number engaged in agriculture or any branch thereof, the distances which separate them, the conditions incident to the production of agricultural products, the inherent difficulties involved in controlling acreage, the variableness of production due to climatic causes—the caprice of the seasons—and the number of agricultural products that may be substituted for each other furnish a reasonable basis for classification. Other instances of classification do not appear to have more justification. For instance, the Federal Trade Commission act[78] condemns unfair competition by those engaged in interstate or foreign commerce, but banks are specifically excepted from the provisions of that act. That act has been repeatedly upheld by the Supreme Court of the United States.[79]

Moreover, in so far as the Capper-Volstead Act is concerned, it is questioned if there is any clause in the Federal Constitution that

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[78] 38 Stat. 717.

[79] Federal Trade Commission *v.* Gratz et al., Copartners, 253 U. S. 421, 40 S. Ct. 572; Federal Trade Commission *v.* Winsted Hosiery Co., 258 U. S. 483, 42 S. Ct. 384.

that act could be said to violate. Cases like the Connolly case[80] have no bearing on the constitutionality of the Capper-Volstead Act because all such cases are based on the equal protection clause of the Federal Constitution, which clause by its own terms is restricted to State action only and has no bearing on Federal legislation as the Supreme Court of the United States has held.[81] It is true that two Federal district courts without referring to any provision of the Constitution held that the exemption of farmers contained in the war measure known as the food control act[82] was unconstitutional,[83] but a circuit court of appeals held the exemption valid.[84]

State legislation which provides specifically for the peculiar needs of farmers or producers under the decisions of the Supreme Court of the United States is founded on a reasonable basis of classification, and on this theory the Bingham Cooperative Marketing Act of Kentucky,[85] which by its terms was restricted to producers, was upheld by the Supreme Court.[86] A statute of Louisiana which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses was upheld although " planters and farmers grinding and refining their own sugar and molasses " were excepted therefrom.[87]

A case decided by the Supreme Court of the United States on February 18, 1929, draws a distinction between the cooperative type of business and the commercial type of business.[88] In this case a statute of Oklahoma, declaring all cotton gins in that State public utilities and providing that no cotton gin for the public ginning of cotton could be established unless the corporation commission of the State finds that public necessity therefor exists, was involved. This statute contains an exception providing that if 100 citizens and taxpayers in the community where it is proposed to establish a cotton gin present a petition showing that the gin is to be run cooperatively, the corporation commission " shall issue a license for said gin without any further showing." The operator of a commercial gin that would have been adversely affected by the establishment of a cooperative gin brought suit against the corporation commission and the Durant Cooperative Ginning Company, to enjoin the commmission from issuing a license to that company. The court referred to two cooperative acts of Oklahoma, one enacted in 1917 and the other enacted in 1919, and with reference to these two acts said:

> It is important to bear in mind that the Durant company was not organized under the act of 1917, but under that of 1919. The former authorizes the formation of an association for mutual help, without capital stock, not conducted for profit, and restricted to the business of its own members, except that it may act as agent to sell farm products and buy farm supplies for a nonmember, but as a condition may impose upon him a liability, not exceeding that of a member, for the contracts, debts and engagements of the association, such services to be performed at the actual cost thereof including a pro rata

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[80] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679; In re Grice, 79 F. 627; Beatrice Creamery Co. *v.* Cline, 9 F. (2d) 176.

[81] Truax *v.* Corrigan, 257 U. S. 312, 340, 42 S. Ct. 124.

[82] 40 Stat. 276.

[83] United States *v.* Armstrong et al., 265 F. 683; United States *v.* Yount et al., 267 F. 861.

[84] C. A. Weed & Co. *v.* Lockwood, 266 F. 785.

[85] Set forth on p. 118 of appendix.

[86] Liberty Warehouse Co. *v.* Burley Tobacco Growers' Co-op. Marketing Ass'n, 276 U. S. 71, 48 S. Ct. 291.

[87] American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89.

[88] Frost *v.* Corporation Commission of Oklahoma et al., 278 U. S. 515, 49 S. Ct. 235, reversing decision of trial court, 26 F. (2d) 508.

> part of the overhead expenses. (Comp. Stats. 1921, par. 5608.) Under this exception, the difference between a nonmember and a member is not of such significance or the authority conferred of such scope as to have any material effect upon the general purposes or character of the corporation as a mutual association. *As applied to corporations organized under the 1917 act, we have no reason to doubt that the classification created* by the proviso might properly be upheld. (American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102; Warehouse Co. *v.* Tobacco Growers, 276 U. S. 71, 48 S. Ct. 291, 72 L. Ed. 473.) A corporation organized under the act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding 8 per cent per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual association. Like its individual competitor, it does business with the general public for the sole purpose of making money. Its members need not even be cotton growers. They may be—all or any of them—bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporaton. The differences relied upon to justify the classification are, for that purpose, without substance. The provision for paying a portion of the profits to members or, if so determined, to nonmembers, based upon the amounts of their sales to or purchases from the corporation, is a device which, without special statutory authority, may be and often is resorted to by ordinary corporations for the purpose of securing business. As a basis for the classification attempted, it lacks both relevancy and substance.

The Supreme Court held the exception in the Oklahoma statute in question unconstitutional. The reason was that the court found the method of doing business, which the cooperative gin in question was authorized to follow by the statute under which it was organized, was so similar to that which was followed by commercial gins that there was no sound difference between the two. The court said: " Like its individual competitor, it does business with the general public for the sole purpose of making money." It is submitted that this language reveals the real reason why the court held the exception to the Oklahoma statute unconstitutional. The court distinctly pointed out that cooperative corporations formed under the 1917 act, under which members and nonmembers must be treated alike, and which function on a nonprofit basis, were so different from commercial concerns as to entitle them to a distinct classification; and if the so-called cooperative corporation involved had been formed under the 1917 act, the court indicates it would have held the exception to the Oklahoma statute constitutional. Obviously, there is a broad distinction between the cooperative type of business and the commercial type of business. In fact, the terms in question are antonyms.

This case should not be regarded as bringing into question any of the cooperative statutes. It involved a licensing act which authorized a commission to deny a license to any applicant therefor other than a cooperative; and the court was of the opinion that the manner of operation of the particular " cooperative " gin in question was not sufficiently different from that of a private gin to justify the granting of a license to the " cooperative " gin without a showing of public necessity therefor. The cooperative statutes, generally speaking, do not prevent private parties from going into business.

In other fields than agriculture there are many interesting examples of classification. For instance, a statute of Minnesota that fixes the closing hours for barber shops was upheld although the closing hours for other establishments were not fixed.[89] A statute of Mississippi which forbade corporations from operating both cotton-oil mills and cotton-oil gins, but which permitted the operation of either by any corporation, was held constitutional.[90] A statute of Kansas which distinguished between farmers' mutual insurance companies and those operated on a commercial basis was also upheld.[91]

The right of employees to form labor unions to bargain collectively and to follow up their demands by orderly strikes is established.[92]

PROMISSORY NOTES

It is a practice more or less followed by cooperative associations to receive the notes of their members for specified amounts for the purpose of using them as collateral for loans that may be necessary in the conduct of the association's business and for other purposes. The exact character of such notes depends upon the terms and conditions under which they are given and upon the law of the particular State.[93] For instance, if at a meeting of an association a majority adopts a resolution specifying that "each stockholder should pledge himself for the sum of $350 to indemnify and save the directors harmless" from any loss for becoming personally responsible to the creditors of the association, and only a part of the stockholders execute such notes, the association can not successfully sue the stockholders that do not execute such notes, because "the stockholders present at the stockholders' meeting could not bind those not present who failed or refused to comply with the terms of the resolution." When anyone failed or refused to sign, no obligation to pay was imposed on those who did sign,[94] but if all the members enter into an agreement to protect the association the obligation is otherwise.[95]

The by-laws of an association usually set forth the agreement between the association and the members relative to the notes, and this agreement would probably in all cases determine the character of the notes as between the association and a member, and whether the association could successfully sue a member on such a note. This would not necessarily be true, however, as will be shown later, as between a third person who had received the note of a member from the association.

If the notes executed by the members of an association and delivered to it are accommodation notes—that is, notes executed without consideration and for the purpose of enabling the association to borrow money or obtain credit thereon—then it is settled that the association could not successfully sue a member on such a note. The maker of an accommodation note is known as the accommodation maker. He receives nothing for executing the note and signs it to enable the one in whose favor it is drawn to obtain money or credit from some third party. The fact that a note or other negotiable instrument, no matter what its character, was executed without consideration can always be shown as between the original parties. It furnishes the maker with a complete defense as against the original payee.

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[89] Petit *v.* Minnesota, 177 U. S. 164, 20 S. Ct. 666.

[90] Crescent Cotton Oil Co. *v.* State of Mississippi, 257 U. S. 129, 42 S. Ct. 42.

[91] German Alliance Insurance Co. *v.* Lewis, Superintendent of Insurance of the State of Kansas, 233 U. S. 389.

[92] American Steel Foundries *v.* Tri-City Central Trades Council et al., 257 U. S. 184, 209, 42 S. Ct. 72; Truax et al. *v.* Corrigan et al., 257 U. S. 312, 357, 42 S. Ct. 124.

[93] Farmers' Equity Co-op. Ass'n *v.* Tice, 122 Kan. 127, 251 P. 421; Elmore *v.* Maryland & Virginia Milk Producers' Ass'n, Inc., 145 Va. 42, 132 S. E. 521.

[94] Farmers' Co-op. Union et al. *v.* Alderman et al., —— Kans. ——, 267 P. 1110.

[95] Farmers' Equity Co-op. Ass'n *v.* Tice, 122 Kan. 127, 251 P. 421.

If a negotiable note, whether accommodation or otherwise, has been sold, delivered, or transferred, before it is due to a third person, in good faith and without notice and for a valuable consideration, the note is enforceable by such third person against the maker without reference to intervening equities. This rule is settled.[96] However, if an accommodation note is delivered after it is due, although transferred in good faith to a third person and for a valuable consideration, the courts are divided as to whether the maker of the note may plead intervening equities as a defense against the holder.

The general rule, without special regard to accommodation notes, is that one who takes a note or other negotiable instrument after it is due takes it subject to all the equities or defenses that existed between the original parties.[97] For instance, if a note is given without consideration, this could be shown by the maker when sued by one who took the note after it was due.[98]

In the eyes of the law, the fact that the note was not paid when it was due, is notice to the party who takes it from the former holder that there is some defect in the paper. However, with respect to accommodation paper, in view of the fact that it is always given without consideration, the courts in a majority of the States have refused to allow the maker to plead a want of consideration, although the note was taken after it was due.[99] But in some jurisdictions the maker of an accommodation note may successfully plead a want of consideration even as against one who received it in good faith and for a valuable consideration from the original payee.[1]

If a note is payable on demand, the general rule as to ordinary negotiable commercial paper is that one who takes it an unreasonable time after its execution takes it subject to all defenses that existed between the original parties.[2] If the maker would not have a defense to a suit on the note if brought by the original payee, he would not have a defense to a suit instituted by one who took the note from the original payee either before or after maturity. With respect to accommodation paper payable on demand, in those jurisdictions where a want of consideration may be shown by the maker as against one who took such paper after it was due, the maker may successfully plead this defense as against one who took the demand accommodation note an unreasonable time after its execution. In a North Dakota case [3] it was said: "It is well established that a note payable on demand is due within a reasonable time after its date, and there are practically no authorities which hold that such a reasonable time can be extended beyond a year."

In a doubtful case it would be a question for the jury to determine whether a note had been sold or delivered as collateral for a loan an unreasonable length of time after its execution. In those States in which the defense of a want of consideration can not be successfully made by the maker of accommodation paper as against one who took it after it was due, it follows that he could not make it as against one who took a demand accommodation note an unreasonable time after its execution.

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[96] National Bank of Commerce *v.* Sancho Packing Co., 186 F. 257.

[97] Otis Elevator Co. *v.* Ford, 27 Del. 286, 88 A. 465.

[98] Hill *v.* Shield, 81 N. C. 250, 31 Am. Rep. 499.

[99] Naef *v.* Potter, 226 Ill. 628, 80 N. E. 1084, 11 L. R. A. (N. S.) 1034.

[1] Chester *v.* Dorr, 41 N. Y. 279; Peale *v.* Addicks, 174 Pa. 543, 549, 34 A. 201, 34 A. 203.

[2] Otis Elevator Co. *v.* Ford, 4 Boyce's (27 Del.) 286, 88 A. 465.

[3] McAdam *v.* Grand Forks Mercantile Co., 24 N. D. 645, 140 N. W. 725, 47 L. R. A. (N. S.) 246, 251.

A note executed by a member of a cooperative association and delivered to it, and on which the association could not successfully sue the member, and on which money had not been borrowed or credit obtained, is not a part of the assets of the association. If the association fails or goes into the hands of a receiver, the receiver could not enforce such a note against the member, for he stands in no better position than did the association.[4] On the other hand, if the note is one on which the association could successfully sue, it follows that it is part of the assets of the association, and a receiver would be able to maintain a suit thereon.

In a Michigan case the receiver for a cooperative association brought suit on demand notes which were given by 34 members of the association and which were in possession of the association at the time the receiver took charge of its affairs. The notes were given for the purpose of being used as collateral security, and they so specified. Inasmuch as they had not been used for this purpose, the court held that the members were not liable on the notes and that they in no way constituted assets of the association.[5]

If an association borrowed money on its note, giving as collateral security demand notes signed by members of the association, the person who loaned the money, in the event the note evidencing the same was not paid at maturity, would have the right to bring suit on a sufficient number of the demand notes to pay his claim, without his bringing suit against the association on its note.[6]

Normally, if an association borrowed money on its own note, which was signed on its behalf by its proper officers, the officers would not be personally liable for the amount involved. An officer in signing an association note should make it entirely plain upon the face thereof that he is signing in his official and not in his personal capacity. The normal way is for the name of the association to be affixed to the note by a proper officer, with a statement thereunder that it was affixed thereto " by " him. Although members of an association are not liable for its debts under the statute under which an association is formed, this does not prevent members from giving or endorsing notes to or for the association on which they may be held liable.

AGENCY

COOPERATIVE ASSOCIATIONS AS AGENT

As a general rule, whatever an individual may do in person he may do through an agent. And the doctrine is well established that one who acts through an agent acts himself. An agent derives all of his authority from his principal—the one for whom he is acting.

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[4] Rankin *v.* City National Bank, 208 U. S. 541; Skud *v.* Tillinghast, 195 F. 1; In re Tasker's Estate, 182 Pa. 122, 37 A. 924

[5] Runciman *v.* Brown, 223 Mich. 298, 193 N. W. 880; Taylor *v.* Rugenstein, —— Mich. ——, 222 N. W. 107.

[6] Packard *v.* Abell, 113 N. Y. S. 1005.

Cooperative associations frequently act as agents for members in the sale of produce or the purchase of supplies, and it is therefore important to consider the rights and liabilities of such associations and of their members, under these circumstances.

A case[7] decided in 1922, by the Supreme Court of Washington, illustrates one of the important problems that may arise. A Peach Fruit Growers' Association entered into a contract in its name covering the sale and delivery of fruit to its members. Certain of the members of the Fruit Growers' Association delivered a part of their fruit to plaintiff, but sold and disposed of a quantity thereof to another dealer. Plaintiff brought suit against the members in question to recover an amount equal to the profits which it claimed it would have made if the members had delivered all the fruit in accordance with the contract. The contract, as stated, was with the Fruit Growers' Association and did not state that it was made for the benefit of the members. Defendants claimed that for this reason they could not be sued on the contract. The court held that plaintiff could maintain a suit against the defaulting members because they had delivered some fruit to plaintiff under the contract. The court said:

> If a principal not disclosed by a contract made by and in the name of his agent subsequently claims the benefit of the contract, it thereby becomes his own to the same extent as if his name originally appeared as the contracting party.

In a companion case,[8] decided at the same time and involving the same contract, the facts being that the members sued had not delivered any fruit under the contract, and hence it could not be said (as was said in the other case) that they had claimed the benefit of the contract, it was held that the plaintiff could not maintain a suit against the members involved, and that if any suit was to be maintained it would have to be against the Fruit Growers' Association. It is clear that in either of the cases discussed the buyer of the fruit could have sued the Fruit Growers' Association for the loss sustained through failure to deliver all the fruit contracted for. If, in the contract with the buyer, it had been stipulated that it should look to the Association exclusively, the members could not have been successfully sued in either case.

It should be noted that a provision in the contract of an association with its members can not be invoked to relieve the members of liability to third persons under circumstances similar to those involved in the cases just discussed, unless such provision was brought to the attention of the persons with whom the association contracted prior thereto.[9] In the Federal courts, and it is believed, in most States, the fruit buyer in the last Washington case referred to would have been allowed to sue the members who had not delivered a part of their fruit. The Supreme Court of the United States has said: "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein."[10]

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[7] Barnett Bros. *v.* Lynn et ux., 118 Wash. 315, 203 P. 389; see also Phez Co. *v.* Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970.

[8] Barnett Bros. *v.* Lynn et ux., 118 Wash. 308, 203 P. 387.

[9] Kruse *v.* Seiffert & Weise Lumber Co., 108 Iowa 352, 79 N. W. 118.

[10] Ford *v.* Williams, 62 U. S. 287.

In other words, the general rule appears to be that where a contract is entered into with an agent, the agent contracting in his own name, the person for whom the agent is acting, the principal, may sue the other party on the contract, and in turn the principal may be sued by such party. The fact that the existence of the principal is known or unknown to the opposite party at the time the contract is made is immaterial.[11] Of course, a cooperative association could include a provision in its contract with one with whom it was dealing that would control the situation.

In connection with the general matter now under discussion it should be remembered that members of an association are liable to suit, or they may sue, not because they are members of the association, but because they are the principals for whom the association acted. It will be remembered that an incorporated cooperative association is an artificial entity, separate and apart from its members. No case has been found in which members of an association have been held liable for wrongful acts or negligence of an association while acting as agent for members in the transaction of certain business or in the doing of certain work authorized by them, but no reason is apparent why they could not be so held in a proper case.

The true conception of this matter can be readily understood when one bears in mind that he is liable, as a general rule, for all acts of his agent while the agent is acting within the scope of his employment. The character of the agent, whether an individual, partnership, or incorporated association,[12] is immaterial. It is upon this theory that automobile owners, whether individuals or corporations, are held liable for injuries to others caused by the negligent driving of their machines by their agents or employees. It is no answer that an agent was not authorized to do the particular act which caused injury or loss if it was done while in the course of the business of his principal or employer.

COOPERATIVE ASSOCIATIONS LIABLE FOR ACTS OF AGENTS

Incorporated cooperative associations, like other corporations, are liable for the acts of their agents while such agents are acting within the scope of their employment. A corporation may be liable for assault and battery, conversion, nuisance, trespass, libel and slander[13] malicious prosecution, wrongful arrest, false imprisonment, fraud and deceit.[14] It may also be guilty of crimes.[15] It is apparent that all of the acts enumerated would have to be done by the officers, agents, or employees of a corporation, as a corporation can act in no other way. There is nothing in the nature of an incorporated cooperative association to relieve it from liability under circumstances in which any other type of corporation would be liable, and undoubtedly they may be held liable in a proper case for any of the matters mentioned above. For instance, in a California case, it appeared that the Escondido Citrus Union fumigated the orchard of one of its members without his consent, and in a negligent manner. As a result, the orchard was badly damaged. The member then brought suit against the union and recovered a judgment for $2,250.[16]

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[11] Chapman *v.* Java Pac. Line, 241 F. 850, and numerous cases therein cited.

[12] Alabama Power Co. *v.* Bodine, 213 Ala. 627, 105 So. 869; New York Trust Co. *v.* Carpenter, 250 F. 668.

[13] Buckeye Cotton Oil Co. *v.* Sloan, 250 F. 712.

[14] Fletcher, Cyclopedia Corporations, v. 5, sec. 3336.

[15] Fletcher, Cyclopedia Corporations, v. 8, sec. 5369.

TAXES

GENERAL TAXES

In every State of the Union it is believed the physical property of a cooperative association, such as buildings, office equipment, trucks, and the like, is liable for property taxes on the same basis as similar property owned by others. Taxes must be imposed pursuant to law, and in the case of those imposed by a State or any municipality or subdivision thereof, the taxes must be imposed in accordance with laws that are in harmony with the State and Federal Constitutions. Broadly speaking, a State or the Federal Government has relatively broad powers with respect to the classifying of property for taxation.

Is an association liable for property taxes on products which it has received from its members for marketing if it is in possession of such products at the time property taxes are assessed? This is a local question, but, generally speaking, if an association takes title to the products which it is engaged in marketing, there would appear to be little doubt but that it would be liable for taxes thereon. If an association were simply acting on an agency basis in the marketing of products, generally speaking it would not be liable for such taxes, because, as a rule, taxes are imposed upon the owner of property or the person who occupies the relation of principal rather than upon the agent who may have custody of the property or be employed to sell the same. In a Kentucky case it was said, referring to the Burley Tobacco Growers' Cooperative Association: "Under its charter and the marketing agreement shown above, the association is authorized to incur all necessary expenses in holding and marketing, and this together with the absolute legal title and full control of the article certainly includes liability for taxation."[17]

In Massachusetts it was held that a city of that State was entitled to tax tobacco in the hands of an association that was stored by it within the city, the tobacco having been received by the association under a purchase-and-sale contract. The court said: "The tobacco on which the tax was levied was the property of the plaintiff." The association involved was organized in Connecticut but was doing business in Massachusetts.[18]

In the Kentucky case referred to, involving the question of the liability of an association for city taxes on tobacco that it had on hand in the city on assessment day, which tobacco had been received by it under a purchase-and-sale contract, section 31 of the cooperative act of that State was declared unconstitutional[19] because the practical effect of that section was to exempt "all products held by the association from all taxation," thus violating the rule of uniformity required by the State constitution and adding to the exemptions allowed thereunder.[20] No other cooperative statute contains a taxation provision like that in the Bingham Act.

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[16] Andreen *v.* Escondido Citrus Union, —— Calif. App. ——, 269 P. 556.

[17] Burley Tobacco Growers' Co-op. Ass'n *v.* City of Carrollton, 208 Ky. 270, 270 S. W. 749.

[18] Connecticut Valley Tobacco Ass'n, Inc., *v.* Inhabitants of Town of Agawam, —— Mass. ——, 158 N. E. 506.

[19] See sec. 31 of Bingham Cooperative Marketing Act on p. 125 of appendix.

In a later Kentucky case, which involved the right of a city in Kentucky to impose taxes on tobacco stored therein by the Dark Tobacco Growers' Association, received by it under a purchase-and-sale contract, it was held that the city was not entitled to levy taxes on the tobacco because the constitution of the State authorized its general assembly "to determine what class or classes of property shall be subject to local taxation," and an act of the assembly declared that "agricultural products in the hands of the producer or in the hands of any agent or agency of the producer to which said products had been conveyed or assigned for the purpose of sale by the producer" were exempt from liability for local taxes. Although the marketing contract under which the tobacco was received was a purchase-and-sale contract, the court was of the opinion that inasmuch as the "central purpose in the contract was to create an agency with the absolute power in the designated agent to handle and market the tobacco of the grower," that the exemption statute covered a situation of this kind.[21]

LICENSE AND STAMP TAXES

In a Kansas case the court held that a cooperative association engaged in the handling of wheat was not liable for taxes on account of wheat held by it, under a tax statute relative to merchants, which in effect defined the term "merchant" as one who had "possession of personal property either purchased by it for sale at an advanced price or profit, or consigned to it to be sold in that manner—that is, at an advanced price or profit," because the association did not come within the statutory definition of a merchant. Moreover, the court regarded the association as "a mere instrument through which the members undertake by concerted action to market their own crops," and placed emphasis upon the fact that the members do not bargain with the association over prices[22] but receive all "it receives, less present and future expenses."

Many of the cooperative statutes contain a provision reading substantially as follows: "Each association organized hereunder shall pay to the State tax commission an annual fee of $10, in lieu of all franchise, or license, or corporation taxes."[23]

The Federal revenue acts of 1921 and 1924 contain a stamp-tax provision[24] reading: "Capital stock, issued: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents."

The Kansas Cooperative Wheat Marketing Association, a nonstock organization, paid, under protest, a stamp tax of 5 cents on each of its certificates of membership under the foregoing provision. The association then sucessfully brought suit for the recovery of the amount paid.[25] The court held that the certificates of membership of the association did not come within the scope of the statutory provision in question and said that "Before any member has anything of monetary value in the hands of the association, he must not alone have become a member, as shown by certificate of membership, but must further have delivered wheat to the association; that two or a dozen certificates of membership in the association are of no more actual worth or value than is one."

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[20] Burley Tobacco Growers' Co-op. Ass'n *v.* City of Carrollton, 208 Ky. 270, 270 S. W. 749.

[21] City of Owensboro *v.* Dark Tobacco Growers' Ass'n, 222 Ky. 164, 300 S. W. 350.

[22] Kansas Wheat Growers' Ass'n *v.* Board of Commissioners of Sedgwick County et al., 119 Kan. 877, 241 P. 466.

[23] New York Laws 1926, ch. 231, sec. 130.

[24] Comp. Stat., sec. 6318p.

The stamp provision quoted above was amended by section 441 of the revenue act of 1928 [26] so as to make it plain that the provision referred to did not apply to "stocks and bonds and other certificates of indebtedness issued by any farmers' or fruit growers' or like associations organized and operated on a cooperative basis for the purposes, and subject to the conditions, prescribed in paragraph (12) of section 231 of the revenue act of 1926.

INCOME TAXES

Section 103 of the revenue act of 1928 [27] provides that—

> The following organizations shall be exempt from taxation under this title—
>
> * * * * * * *
>
> (12) Farmers', fruit growers', or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of the sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases.[28]
>
> (13) Corporations organized by an association exempt under the provisions of paragraph (12), or members thereof, for the purpose of financing the ordinary crop operations of such members or other producers, and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other

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[25] Kansas Co-op. Wheat Marketing Ass'n *v.* Motter, and Kansas Wheat Growers' Ass'n *v.* Motter, 14 F. (2d) 242.

[26] 45 Stat. 791.

[27] 45 Stat. 791, see United States *v.* Cambridge Loan & Building Co., 278 U. S. ——, 49 S. Ct. 39.

[28] Appeared first in revenue act of 1926, 44 Stat., p. 40–41, sec. 231.

than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the corporation, upon dissolution or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose.

For a cooperative marketing or purchasing association, or an association engaged in both activities, to be exempt from liability for the payment of Federal income taxes, under paragraph (12) above, the association must meet the conditions specified in that paragraph. Attention is called to the fact that the association must be organized and operated on a cooperative basis and that nonmember patrons must be treated on the same basis as members. That is to say, if patronage dividends are paid to members, nonmember patrons must also be paid patronage dividends, either in cash or as a credit toward the purchase of stock or a membership fee, if the association is to be entitled to exemption. An association may do business with nonmembers provided the amount of products marketed for nonmembers does not exceed in value the amount marketed for members; and an association may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members. The amount of purchases which may be made for persons who are neither members nor producers must not exceed 15 per centum of the value of all its purchases. Of course, persons who are neither members nor producers would ordinarily be town people.

The fact that an association has capital stock does not affect its right to exemption if the dividend rate on the stock is fixed at not to exceed the legal rate of interest in the State of incorporation, or 8 per centum per annum. In order to obtain exemption, an association formed with capital stock must have substantially all of the stock other than nonvoting preferred stock held by producers who market their products or purchase supplies and equipment through the association.

For an association to obtain exemption, it must satisfactorily explain in its application for exemption the reason why any of its stock is owned by persons who are not actually producers, and, generally speaking, an association will be required to show that the ownership of its capital stock has been restricted as far as possible to actual producers.

If by statutory requirement all officers of an association must be shareholders, the ownership of a share of stock by a nonproducer to qualify him as an officer will not destroy the association's exemption. Likewise, if a shareholder for any reason ceases to be a producer and the association is unable, because of a constitutional inhibition or other reason beyond the control of the association, to purchase or retire the stock of such nonproducer, the fact that under such circumstances a small amount of the outstanding capital stock is owned by shareholders who are no longer producers will not destroy the exemption.[29]

Nonvoting preferred stock may be held in any amount by anyone without affecting the rights of the association to exemption, provided that the stock is not entitled or permitted to participate directly or indirectly in the profits of the association upon dissolution or otherwise beyond the fixed dividends.[30]

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[29] Art. 532, Regulations 74 relating to the income tax under the revenue act of 1928, issued by the Treasury Department.

The Bureau of Internal Revenue denied the right of an association to exemption where it appeared that 12 per cent of the common stock of the association was held by nonproducers and where over 9 per cent of the common stock was voluntarily sold or issued to persons who were not producers. In another case an association was denied exemption because its records did not disclose the amount of business which it had done with members and the amount which it had done with nonmembers. In other words, the association was unable to show from its books that it was entitled to exemption, because its records did not show the amount of business done with nonmembers.

With respect to the earnings or savings accruing on nonmember business, the Bureau of Internal Revenue has taken the position that such earnings or savings effected on the business of a given nonmember may be applied by the association on the payment of a share or shares of stock in the case of an association formed with capital stock or on a membership fee in the case of an association formed without capital stock in lieu of returning the amount involved to him in cash; the books of the association should show that this has been done and the nonmember should be advised accordingly.

Under the language quoted above, an association may not be denied exemption because it accumulates and maintains a reserve required by State law or a reasonable reserve for any necessary purpose. In view of this language, an association could set aside all of its savings or earnings as reserves, if this were reasonable in view of the financial situation of the association and its plans and policies.

Cooperative associations that are not exempt from the payment of income taxes are not required to pay such taxes on patronage dividends or refunds paid to members or patrons on account of business done by them with the association. On the other hand, the amount paid by an association as dividends on its capital stock would be taxable, sums carried by it to reserves would apparently be taxable, and, generally speaking, any profits accruing on business done with members or nonmembers would be taxable, but any patronage dividends paid to members or nonmembers would be deductible from this amount.

With respect to the type of corporation that is exempt under the provisions of paragraph (13) quoted above, Regulations 74 relating to the income tax under the revenue act of 1928, issued by the Treasury Department, provides as follows:

> (c) Corporations organized by farmers' cooperative marketing or purchasing associations, or the members thereof, for the purpose of financing the ordinary crop operations of such members or other producers are also exempt, provided the marketing or purchasing association is exempt under section 103 (12), and the financing corporation is operated in conjunction with the marketing or purchasing association.

In addition, the discussion given above with respect to the right of associations to obtain exemption under the language of paragraph (12) applies to corporations coming under paragraph (13) in so far as reserves, surplus, and capital stock are concerned.

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[30] In re Temtor Corn & Fruit Products Co., 299 F. 326; Schlafly *v.* United States, 4 F. (2d) 195.

Each association, at the first opportunity, should ascertain its status with respect to liability for Federal income taxes. This should be done by applying to the collector of internal revenue for the district in which the association has its principal office for a form on which to make application for exemption. Obviously, the Bureau of Internal Revenue must make inquiries for the purpose of ascertaining if a given association is, in fact, entitled to exemption. Many associations have assumed that they were exempt from liability for the payment of income taxes when, in fact, they were not exempt because they did not qualify for exemption, and several years elapsed before they were called upon and were compelled to pay taxes. This has resulted in hardships which could have been avoided had the associations promptly ascertained their liability for income taxes.

PATRONAGE DIVIDENDS

What are patronage dividends? They are not dividends at all in the sense in which that term is ordinarily employed, but are refunds or savings. The aim of a cooperative association is to operate on a cost basis, or as near thereto as practicable, giving the members of the association the entire selling price of their products, less necessary marketing expenses and any other authorized deductions for maintaining and developing the association. Patronage dividends are simply a means of enabling associations the better to achieve this result.

The question of patronage dividends arises principally, if not solely, with respect to associations that have a fixed schedule of charges for the handling of products and in the case of associations that pay for products handled at the time of receipt. For instance, some cooperative elevators have a fixed charge per bushel for the marketing of the grain they handle, generally the same as the going rate charged by private operators, whereas others aim to pay the current price therefor. In each case it is contemplated that at the end of the year, or of a fixed period, the expenses and costs of operation of the association will be ascertained and that the amount remaining will be distributed among the members on the basis of the quantity of product, or the value thereof, marketed by the association for each of them.

In the case of associations that have a schedule of charges, it is contemplated that the returns therefrom will more than cover all expenses of the association, but obviously it is unknown in advance what the exact amount of the expenses will be, and in the case of associations that pay the current price for the products handled, it is contemplated that the products will be sold for prices that will leave a balance after meeting all expenses; but the amount of this balance is likewise unknown in advance. At the end of the year, or of a fixed period, the expenses of the association are ascertained, and this amount, together with any other deductions such as deductions for working capital or reserves, is subtracted from the total amount which has been received by the association for handling charges or from the total sale price of the product. The balance, or such portion thereof as the board of directors of the association deems advisable, is then returned to the members of the association on the basis of the volume, or of the value, of the product which each marketed through the association.

It is apparent, therefore, that patronage dividends are a means of returning to members savings effected by cooperatives in marketing their products. Manifestly, this is fundamental to cooperation because there would be less incentive to cooperate if the savings effected in marketing expenses, or otherwise, could not be returned to members. Patronage dividends are based primarily upon products delivered and sold, and not upon the dollars invested.

The amount of the patronage dividends to which a member is entitled is ascertained, by some associations, in substantially the following manner: The total amount available for distribution among the member patrons at the end of the year or other period is determined. This amount is then divided by the volume of business handled by the association in terms, for instance, of cars, bushels, pounds, head, or the value of the product handled in dollars, or the amount paid to the association as handling charges. The figure thus found, when multiplied by the number of cars, for example, handled for a given member, gives the amount of his patronage dividends.[31] In other associations the patronage dividends are ascertained by dividing the total amount available for distribution by the total sale price of the products handled and then multiplying the price received for the products of each member by this percentage.

Patronage dividends, it may be assumed, would not be paid in many instances, if at the time the members of an association delivered their products to it, or on their sale, the association knew the exact amount it would cost to market the products of its members and provide for expansion purposes. It is apparent that patronage dividends are the result of necessity, in many instances at least, and that they simply furnish a medium by which the undertaking of the association to operate on a cost basis, or as near thereto as possible, may be carried out.

A novel case involving patronage dividends arose in Kansas[32] in which the plaintiff, who was not only a farmer and a stockholder in the defendant corporation but was also engaged in the grain business, was held not to be entitled to patronage dividends on grain that he had purchased from the corporation, but that the other shareholder patrons were entitled to the amount involved. The statute of Kansas under which the elevator company was incorporated, provided that after the payment of a fixed dividend upon stock, the remainder of its earnings should be prorated to its several stockholders upon the basis of their purchases or sales, or on both such sales and purchases. The court was of the opinion that the purchase by the plaintiff of grain from the elevator on a commercial basis was not such a purchase as was contemplated by the statute and, hence, that he was not entitled to patronage dividends.

The Grain Futures Act of September 21, 1922,[33] provides that the Secretary of Agriculture may designate any board of trade as a "contract market," if among other things—

> the governing board thereof does not exclude from membership in, and all privileges on, such board of trade, any duly authorized representative of any

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[31] Mooney *v.* Farmers' Mercantile & Elevator Co., 138 Minn. 199, 164 N. W. 804.
[32] McClure *v.* Co-operative Elevator & Supply Co., 105 Kan. 91, 181 P. 573.
[33] 42 Stat. 998, 1000, 1001.

lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in cash grain business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided*, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

The Supreme Court of the United States in passing upon the constitutionality of The Grain Futures Act [34] referred particularly to the paragraph of the statute in part quoted above and upheld the same, and in doing so said:

> Nor do we see why the requirement that the relation between them and this representative, looking to economy of participation on their part by a return of patronage dividends, should not be permissible because facilitating closer participation by the great body of producers in transactions of the board which are of vital importance to them. It would seem to make for more careful supervision of those transactions in the national public interest in the free flow of interstate commerce.

The State of Kansas passed a statute [35] requiring boards of trade in that State which were not operating under the Federal grain futures act to admit cooperatives. This act specifies that the making of refunds by a cooperative shall not be a cause for exclusion. This statute was passed upon and upheld by the Supreme Court of Kansas,[36] and in the opinion the court said:

> The sole objection is that plaintiff sees fit to distribute its profits in a manner objectionable to defendant. One is tempted to inquire: What concern is it of defendant what plaintiff does with its profits, whether it retains them for additional working capital, or disburses them to its stockolders? And if it does disburse them to its stockholders, why should defendant be concerned with the basis of such disbursement, so long as it is satisfactory to plaintiff and its stockholders, and in conformity with the statute under which it was created? It may be doubted whether plaintiff's method of disbursing profits is correctly construed as a violation of defendant's by-laws against rebating or refunding commissions.

The Packers and Stockyards Act, 1921,[37] recognizes the right of cooperative livestock market agencies to pay patronage dividends to their producer members. This statute was upheld by the Supreme Court of the United States.[38]

In some respects the practice of paying patronage dividends is analogous to that followed by many commission men and brokers who, upon receipt of products consigned to them and before their sale, make advances to their shippers and then, on the sale of the products, deduct their charges and the amount of the advances, and return any balance to the shippers.

It is a fact frequently overlooked that virtually all persons who carry life insurance in a mutual company receive what amounts to patronage dividends. It is true that these dividends are not referred to as patronage dividends, but in essence they are practically the same thing. The undertaking of a mutual insurance company may be said to contemplate the furnishing of insurance on a basis that will enable it to meet all of its obligations, including current and prospective expenses incident to maintaining and operating the company. At the end of a year or other period it is the practice for mutual insurance companies to ascertain the amount of the items referred to (due consideration being given to the risks and hazards involved) and then to return to the patrons or policyholders sums of money called dividends which are based upon the amounts which the policyholders have paid and which were found to be unnecessary for the purposes specified. An insurance company can not determine in advance the precise amount which should be charged for insurance to cover the items in question, nor can a cooperative association determine in advance the precise amount necessary to meet its expenses and any other necessary charges. In the case of the insurance companies, they charge enough for the insurance to cover all possible contingencies, with the idea of returning any surplus to policyholders at the end of a given period. Cooperative associations follow a like practice.

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[34] Board of Trade of the City of Chicago *v.* Olsen, U. S. Attorney, 262 U. S. 1, 41, 43 S. Ct. 470.

[35] Laws of Kansas, 1925, ch. 6.

[36] Farmers' Co-op. Commission Co. *v.* Wichita Board of Trade, Kan. ——, 246 P. 511, 513.

[37] 42 Stat. 159.

[38] Stafford *v.* Wallace, 258 U. S. 495, 42 S. Ct. 397.

There is no magic or mystery about patronage dividends or refunds; they simply represent a practical means of achieving a given result, namely, the return to the members of an association of savings effected thereby.

CERTIFICATES OF INDEBTEDNESS

Since many cooperative associations issue certificates of indebtedness, an inquiry into the character of such certificates and their status is of interest. A certificate of indebtedness, as the term suggests, is a written acknowledgment by the issuing association that it is indebted for the amount stated, to the person named therein. The paper certifies to this fact. It is written evidence that the lawful holder of the certificate has a claim against the association issuing the certificate in accordance with its terms.

Certificates of indebtedness are generally used as a link in the revolving-fund plan of financing an association. The plan is one under which the capital needed by an association is equalized and, to a degree at least, is shifted from year to year so that all members who utilize the association help to furnish its capital in proportion to the use they make of the association. The plan contemplates the redemption of some certificates from time to time and the issuance of other certificates to the same or to different members. The certificates are written evidence of loans which the members of an association have made thereto.

Generally, if not always, the certificates are issued because of deductions made by the association from the proceeds derived from the sale of the products of members. These deductions are authorized by the marketing contract, or by the by-laws of the association, or by both. The method by which the association acquires the money does not change the essential character of the transaction, which is simply that of a loan.

The terms of repayment of certificates vary with different associations. Some associations attach coupons with different maturity dates to their certificates, and by this method the payment of the certificates is distributed over a term of years. Usually, the certificates bear interest.

The terms and conditions of certificates vary. Some certificates specifically state that they are secondary to all other debts of the association and that, in case of liquidation of the association, debts other than those evidenced by certificates of indebtedness shall be preferred and prior claims. In the case of other associations, and probably in the case of the great majority, the certificates of indebtedness contain no provisions that make them junior to other debts of the association.

No instance has been noted in which an attempt has been made to make the holders of certificates of indebtedness preferred creditors of the association, and it is believed that this could not be accomplished by the insertion of a provision to this effect in the certificates of indebtedness without conforming to the lien laws of the State. At least, this would seem to be fundamentally true with respect to other creditors who extended credit to the association without notice that the holders of its certificates of indebtedness were preferred creditors.

If, as is usually the case, the certificates of indebtedness of an association contain no provision with respect to priority of payment, then in the event of liquidation of the association, the holders of the certificates would share on a pro rata basis with other unsecured creditors. And in all cases, all creditors (including certificate holders), in the event of liquidation, would be entitled to payment, before the members or stockholders of the association, as such, could share in its assets.

Money may be borrowed by an association from a third person, and may be secured by property purchased with funds for which certificates of indebtedness were issued. Some associations using certificates of indebtedness offer to redeem them prior to the date on which they are due, as funds are collected for their payment. If authorized by the marketing contract, larger deductions may be made by an association from returns from the sale of products during some periods than are made at other times.

Certificates of indebtedness are usually used as a part of a financing plan which involves a borrowing and repaying process. That is to say, certificates of indebtedness are paid through borrowing for this purpose, usually by the deduction plan, from the members.

May the money which an association deducts or borrows for the purpose of paying certificates of indebtedness on their maturity be seized by other creditors of the association to pay their claims? Or, in the event of a failure, would money raised by an association for paying certificates of indebtedness be available for distribution among the various creditors of the association? A case decided in the Federal courts holds, in principle, that money deducted for the purpose of paying certificates of indebtedness may be seized by other creditors, and that, in the event of a failure, it would be available for distribution among the general creditors.[39] In the event of a failure, the holders of certificates of indebtedness should share on a parity with other unsecured creditors unless the certificates expressly state that they are junior to other claims against the association.

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[39] United States & Mexican Oil Co. *v.* Keystone Auto Gas & Oil Service Co., 19 F. (2d) 624.

In some instances associations have issued certificates of indebtedness and have agreed to pay them at a certain time through the making of deductions of a fixed amount, say, of 1 cent per pound on products handled. Obviously, if the volume of products handled is insufficient to permit the raising of a fund sufficient to pay the certificates on maturity, a question would arise regarding the right of the holders of the certificates then to take action on them. In such cases it is submitted that suit could not be successfully brought on the certificates on their maturity if they were not paid at that time, because both parties assumed that a fund sufficiently large could be raised during the period in question. This assumption indulged in by both parties, proving to be incorrect, would automatically defer the time at which suit could be brought on these certificates. In other words, as the certificates were to be paid out of a fund to be raised in a specified manner, the holders of the certificates can not complain if payment is not made on the date fixed because of the smallness of the fund, there being no dishonesty.

One of the objections that may be raised to the use of the revolving-fund plan of financing is the fact that a serious situation may be created if an association, in a given season, has a greatly reduced volume. This is true whether the amount of the deduction that may be made for the payment of certificates of indebtedness is fixed or not, because (assuming that the amount of the deduction that may be made for the payment of certificates of indebtedness is not fixed) if the volume of products handled by an association in a given year is small because of a crop failure, for instance, then the members who deliver to the association would complain if large deductions were made from the returns for their products.

Some associations issue certificates of indebtedness that do not have a fixed maturity date, with the understanding that the certificates are to be paid in the order in which issued, as funds are available for this purpose. Certificates thus issued may have a restricted sales value because of the uncertainty incident to their time of payment. On the other hand, from the standpoint of the association, there are obvious advantages in issuing certificates that do not have a fixed maturity date; especially is this true if the certificates are to be paid through the making of deductions of a fixed amount. Ordinarily, certificates of indebtedness are transferable so that a member who receives a certificate of indebtedness may borrow thereon or may sell it to any person who wishes to buy it.

Each certificate of indebtedness should show on its face the exact terms and conditions under which it is issued. Especially is this true in the case of transferable certificates. Nearly all certificates of indebtedness bear interest, but of course it is entirely optional with an association whether the certificates it issues bear interest.

If an association saw fit to do so, deductions for financing purposes could be made which would be evidenced by common or nonvoting preferred stock, or by bonds instead of certificates of indebtedness.

ASSOCIATIONS OPERATING IN VARIOUS STATES

May an association formed under the laws of one State do business in other States? If an association desires to enter into marketing contracts with producers in States other than that in which organized, must the association comply with the laws of those States respecting foreign corporations? All of the States, it is believed, have statutes relative to foreign corporations doing business within their borders. If a cooperative association that is formed in one State enters into marketing contracts with producers in another State, and the products covered by the contracts on delivery to the association are to be moved out of the State or are to be delivered to the association out of the State in which grown, then it appears clear that an association would not be required to comply with the laws of the State with respect to foreign corporations. The situation would involve interstate commerce, and the Supreme Court of the United States has held that a corporation of one State may purchase goods in another State for shipment out of the State without the consent of the latter. The following quotation is taken from an opinion of the Supreme Court of the United States.[40]

> A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.
>
> Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown *v.* Maryland, 12 Wheat, 419, 446–447 * * *; American Steel & Wire Co. *v.* Speed, 192 U. S. 500, 519 * * *. On the same principle, where goods are purchased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation. * * *
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> In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that, if the transportation was incidental to buying or selling, it was not material whether it came first or last.

In a Nebraska case it was urged that a cooperative association incorporated under the laws of Kansas could not maintain a suit in Nebraska because the association had not complied with the laws of that State respecting foreign corporations,[41] but the supreme court of Nebraska held that the association was engaged in interstate commerce and hence was not required to comply with the laws of Nebraska affecting foreign corporations. A number of the States have provisions in their statutes which specifically refer to cooperative associations formed in other States.[42] For instance, two provisions from the laws of Indiana [43] illustrative of this matter read as follows:

> (1) Before any foreign corporation without capital stock and not for pecuniary profit shall be permitted or allowed to transact business or exercise any of its corporate powers in the State of Indiana, it shall be required to file in the office of the secretary of state a copy of its charter or articles of incorporation, duly certified and authenticated by the officer who issued the original, or the officer with whom the original was filed or recorded. * * *
>
> (3) The secretary of state, upon the admission of such foreign corporation to do business in the State of Indiana, shall issue a certificate and shall state in such certificate of authority to do business issued by him the powers and objects of said corporation which may be exercised in this State, and no corporation shall by this certificate of the secretary by [be] authorized to transact any business in this State for the transaction of which a corporation can not be organized under the laws of Indiana.

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[40] Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282, 42 S. Ct. 106.
[41] Nebraska Wheat Growers' Ass'n *v.* Norquest, 113 Neb, 731, 204 N. W. 798.
[42] Laws of New York, 1926, ch. 231.
[43] Acts of 1921, p. 117.

The Dark Tobacco Growers' Cooperative Association, incorporated under the cooperative act of Kentucky, applied for and received a license to do business in Indiana. It successfully brought suit on the contract it had entered into with a producer in Indiana.[44] One of the defenses interposed was that an association similar to the Dark Tobacco Growers' Cooperative Association could not have been organized in the State of Indiana and hence that the license to do business in the State that had been issued to the association was void. It will be observed that the statutory provisions quoted above authorize the granting of licenses to do business in the State to associations of a type that could have been formed in the State of Indiana.

In the case under discussion it was claimed that the association was engaged in interstate commerce, but the court pointed out that the application for a license appeared to be an admission that the association was not engaged in such commerce. The court further pointed out that there was no allegation in the complaint of the association that the contract sued on was a part of an interstate commerce transaction. The court, however, said: "If the contract entered into had been a part of a transaction connected with interstate commerce, such license would not have been necessary."

"If a California corporation ships a carload of fruit to a commission merchant in New York to be sold by him on agreed factorage, is the California corporation doing business in New York within the meaning of its statutes of this character? If it contracts to ship 1,000 carloads during the year on the same terms, is it violating the statutes of New York, unless it obtains a license to do business there?"[45]

Assuming that interstate commerce was involved, the answer to the foregoing questions is "No." In addition, a number of the State courts, independent of interstate commerce, have held that their laws respecting foreign corporations do not apply to foreign corporations that ship goods into their States to be sold by factors or commission men. The answers just given will be amplified later.

Each of the States, it is believed, has a statute regarding corporations that are formed in other States but are doing business in the State making the law. These statutes are as applicable to incorporated cooperative associations as to other corporations, unless the language of a particular statute is not broad enough to cover them, or unless the associations are engaged in interstate commerce, or unless for some other reason such statutes are found not applicable to them.

Generally speaking, application for a permit to do business in a State (other than that of incorporation) must be made to the secretary of state of that State. Usually before permission to do business in that State can be obtained, it must be made to appear that a corporation could be formed in that State to engage in the business in which the applicant is engaged. Other usual requirements are a known place of business and a designated person upon whom process may be served.

A State has the right to exclude the corporations of other States[46] except that a State may not exclude or impose conditions on a corporation that is engaged in interstate or foreign commerce.[47] As a part of interstate commerce, a corporation of one State has the right to ship goods into another State and there sell them in the original packages without the leave or license of that State. Again, a corporation of one State may purchase goods in one State for shipment to another without the consent of the latter State.[48] The doing of a single isolated act or transaction does not constitute doing business in a State.[49]

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[44] Dark Tobacco Growers' Co-op. Ass'n *v.* Robertson, 84 Ind. App. 51, 150 N. E. 106, 110.
[45] Butler Bros. Shoe Co. *v.* United States Rubber Co., 156 F. 1, 6.
[46] Pembina Consolidated Silver Mining & Milling Co. *v.* Pennsylvania, 125 U. S. 181.

It is immaterial how a cooperative association markets its products in another State provided they are sold in the original packages or are shipped into the State in response to orders previously obtained for them.[50]

In a leading case decided by the United States Supreme Court[51] it appeared that the State of Michigan imposed an annual tax of $300 upon the business of selling brewed or malt liquors. Citizens of Wisconsin, engaged in manufacturing such liquors in that State, owned a warehouse in Michigan to which they shipped, and in which they stored their liquor for sale in the original packages. Neither they nor their agent paid the tax, but the agent sold the liquor and was arrested and convicted for a violation of the law. The Supreme Court, in holding that the State of Michigan did not have the right to impose the tax, either on the citizens of Wisconsin or upon their agent in Michigan, said:

> We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.

In another case,[52] the Supreme Court of the United States said:

> We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce.

It will be appreciated that the term "original packages" refers to the barrels, boxes, or other containers in which substantial quantities of the product involved are transported.

Entirely independent, apparently, of the fact that interstate commerce was involved, a number of the supreme courts have held that a foreign corporation was not doing business in the State when it appeared that the foreign corporation consigned products to a commission merchant or factor in the State to be sold by him.[53] These cases apparently were decided upon the theory that it was the factor or commission man that was engaged in business in that State and not the foreign corporation.

It is submitted that a cooperative association formed in one State, that is marketing the products which it handles in another, can not be required to comply with the laws of the latter State respecting foreign corporations, if it sells its products in the original packages in which they are shipped into the State through a commission man, factor, or broker, or through the medium of its own exclusive agent located in that State; nor may the latter State impose a tax for doing business, either on the cooperative association or upon its agent, on account of such business.

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[47] Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282, 42 S. Ct. 106.

[48] Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282, 42 S. Ct. 106.

[49] Cooper Manufacturing Co. *v.* Ferguson, 113 U. S. 727.

[50] Caldwell *v.* North Carolina, 187 U. S. 622.

[51] Lyng *v.* Michigan, 135 U. S. 161.

[52] Crutcher *v.* Kentucky, 141 U. S. 47, 58.

[53] Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393; In re Hovey's Estate, 9 Pa. Dist. Rep. 183, affirmed in 198 Pa. 385, 48 A. 311; Cooper Rubber Co. *v.* Johnson, 133 Tenn. 562, 182 S. W. 593; Bertha Zinc & Mineral Co. *v.* Clute, 7 Misc. Rep. 123, 27 N. Y. S. 342; Badische Lederwerke *v.* Capitelli, 155 N. Y. S. 651.

Generally speaking, a State has the right to oust a corporation for violation of its laws. The Burley Tobacco Growers' Cooperative Association, incorporated under the laws of Kentucky, complied with the laws of Tennessee relative to foreign corporations and began to do business in that State. Later the State of Tennessee instituted ouster proceedings against it on the ground that the association had been guilty of coercion in obtaining contracts and was seeking to restrain trade unreasonably. It was held, however, that the association was not guilty of the things charged and that it was entitled to do business in Tennessee.[54]

A distinction should be drawn between the right of a State to tax physical property and the right of carrying on an essential element of interstate commerce in that State. Physical property, such as commodities,[55] trucks, buildings, or equipment, owned by a cooperative association in a State other than that in which it is organized, or similar property owned by the agent of the association in that State, is subject to the normal and customary property taxes free from discrimination within that State.[56]

If a cooperative association or other corporation is doing an intrastate business in a State other than that in which it is organized, it is a serious matter for it to fail to comply with the laws of that State regarding foreign corporations. In many States, an association could not sue in the courts of the State, nor could it enforce its obligations in the Federal courts if it had failed to comply with such laws. In Tennessee, the shareholders of a foreign corporation, under the circumstances in question, are liable as partners.[57] In Colorado, the officers and agents of such a corporation are personally liable.[58]

ASSOCIATIONS AND THIRD PERSONS

If products in the custody of an association are injured, for instance, by fire caused by the negligence of a third person, an association may bring suit for the recovery of the damages in question.[59] Again, if a person has entered into a contract with an association to buy a specified quantity of products, the association may sue for failure to comply with the contract.[60] On the other hand, if a cooperative enters into a contract to sell a specified quantity of products, ordinarily it may be successfully sued for failure to abide by the contract.[61] It should be remembered that if an association makes an unconditional contract to sell a specified quantity of products, the contract is binding, and damages may be recovered for its breach unless its performance was prevented by law, the act of God, or the other party. An association should include exceptions in its selling contracts covering contingencies which may prevent the association from performing its contracts.

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[54] Tennessee *v.* Burley Tobacco Growers' Co-op. Ass'n, 2 Tenn. App. Rep. 674.

[55] Sonneborn Bros. *v.* Cureton, 262 U. S. 506.

[56] Southern Ry. Co. *v.* Kentucky, 274 U. S. 76, 47 S. Ct. 542.

[57] Cunnyngham *v.* Shelby, 136 Tenn. 176, 188 S. W. 1147, L. R. A. 1917B 572.

[58] Fritts *v.* Palmer, 132 U. S. 282.

[59] Louisville & N. R. Co. *v.* Burley Tobacco Society, 147 Ky. 22, 143 S. W. 1040.

[60] National Importing Co. et al. *v.* California Prune and Apricot Growers, Inc., —— Ind. App. ——, 151 N. E. 626.

[61] Eskew et al. *v.* California Fruit Exchange, —— Cal. App. ——, 263 P. 804.

UNINCORPORATED ASSOCIATIONS

Inasmuch as some cooperative associations are unincorporated, a discussion of the legal status of such associations and the rights and liabilities of their members is in order. Such an association may be defined as a body of persons acting together without a charter but employing to a greater or less extent the forms and methods used by incorporated bodies for the prosecution of the object for which formed.[62]

CHARACTERISTICS

The liability of members of an unincorporated business association to third persons is the same as that of partners. In a Vermont case [63] it was said: " Here a voluntary association, composed of many members, adopting by-laws, having an associate name, and providing for certain officers and prescribing their duty, was but a partnership in the eyes of the law." In the absence of statutory or contractual provision on the subject, the death or withdrawal of a member does not dissolve the association.[64] A partnership, on the contrary, under such circumstances is dissolved by the death or withdrawal of a member.[65]

Again, a corporation may sue or be sued in its own name, while at common law, and in the absence of a statute, an unincorporated association can not maintain an action in its own name but must sue in the names of all the members composing it, however numerous they may be.[66] Likewise, such an association in the absence of a statute can not be sued in its society name but the individual members must be sued.[67] A corporation may take title to property in its own name, but an unincorporated association, in the absence of a statute, is ordinarily incapable as an organization of taking or holding either real or personal property in its name.[68]

HOW FORMED

Statutes have been passed in some States expressly authorizing individuals to unite as a voluntary association under a distinctive name, but, as a rule, the organization of unincorporated or voluntary associations is done independent of statutes. They are generally formed under the common-law right of contract. Just as A and B may enter into a contract with reference to doing some lawful act, so a larger number may associate for the accomplishment of a lawful object.

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[62] 5 C. J. 1333.

[63] Houghton *v.* Grimes, —— Vt. ——, 135 A. 15, 18.

[64] Burke *v.* Roper, 79 Ala. 138; Lindemann & Hoverson Co. *v.* Advance Stove Works, 170 Ill. App. 423; Hossack *v.* Ottawa Dev. Ass'n 244 Ill. 274, 91 N. E. 439.

[65] Scholefield and Taylor *v.* Eichelberger, 7 Pet. 586.

[66] St. Paul Typothetæ *v.* St. Paul Bookbinders' Union No. 37, 94 Minn. 351, 102 N. W. 725.

[67] Allis-Chalmers Co. *v.* Iron Molders' Union No. 125, 150 F. 155.

[68] Philadelphia Baptist Ass'n *v.* Hart, 4 Wheat. 1, 4 L. Ed. 499.

Provision may be made for any matter that is the legitimate subject of contract. The qualifications of members may be prescribed, and causes for expulsion may be specified. A constitution is usually adopted which states the objects of the association and other fundamental propositions relative to the organization. By-laws are also usually adopted which prescribe the manner in which the objects of the association are to be attained. The constitution and the by-laws, or either of them, constitute a contract binding all those who agree to them.

In a Michigan case [69] it was said: "The articles of agreement of a benevolent association, whether called a constitution, charter, by-laws, or any other name, constitute a contract between the members which the courts will enforce if not immoral, or contrary to public policy or the law of the land." The foregoing was quoted approvingly in a Kansas case [70] involving an antihorse-thief association, and it is believed it states the general rule.[71] It follows that, inasmuch as a voluntary association rests on a contract or contracts, the rights or liabilities of members among themselves are to be determined by the contracts involved in accordance with common-law principles as modified or supplemented by statutes; and in the absence of a constitution or by-laws, the courts will apply the same legal rules for ascertaining the rights of the parties, weight being given to any usages or customs which may have been followed by the association.[72]

It should be remembered that in order for a constitution and by-laws, or either of them, to constitute a contract between an association and one claiming or alleged to be a member, he must have agreed to them in some way, either by signing papers containing the constitution and by-laws, or by assenting to them in some other way.[73] If one, in joining an association, signs its constitution and by-laws or assents to them in some other way and thus agrees to be bound by them, he is in no position to complain because he is required to comply with the rules and regulations of the association to which he agreed or because he is expelled from the association in accordance with them.[74]

In a New York case [75] involving the New York Stock Exchange, in which it appeared that a former member had been expelled for cause, the court of appeals of that State said:

> The interest of each member in the property of the association is equal, but it is subject to the constitution and by-laws, which are the basis on which is founded the association. They express the contract by which each member has consented to be bound, and which measures his duties, rights, and privileges as such. It seems most clear to me that this constitution and the by-laws derive a binding force from the fact that they are signed by all members, and that they are conclusive upon each of them in respect of the regulations of the mode of transaction of his business, and of his right to continue to be a member.

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[69] Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.
[70] McLaughlin *v.* Wall, 86 Kan. 45, 119 P. 541.
[71] Kalbitzer *v.* Goodhue, 52 W. Va. 435, 44 S. E. 264.
[72] Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919.
[73] Austin *v.* Searing, 16 N. Y. 112, 69 Am. Dec. 665, and note.
[74] State. ex rel. Rowland *v.* Seattle Baseball Ass'n, 61 Wash. 79, 111 P. 1055.
[75] Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225.

In another case[76] it was said:

> The San Francisco Stock and Exchange Board is a voluntary association. The members had a right to associate themselves upon such terms as they saw fit to prescribe, so long as there was nothing immoral or contrary to public policy or in contravention of the law of the land in the terms and conditions adopted. No man was under any obligation to become a member unless he saw fit to do so, and when he did and subscribed to the constitution and by-laws, thereby accepting and assenting to the conditions prescribed, he acquired just such rights, with such limitations and no others, as the articles of association provided for.

ADMISSION OF MEMBERS IN UNINCORPORATED ASSOCIATIONS

It has been previously stated that an unincorporated association may prescribe the qualifications of members. It can not be compelled to admit as members persons whom it chooses to exclude.[77] In other words, the whole matter of the admission of members rests with the association. This is well illustrated in the case of farmers' telephone lines. The question of whether membership can be sold with the farm in such instances has arisen. It is held that an association has the right to control its membership, and a purchaser of a farm merely by virtue of his warranty deed does not become a member of such telephone company.[78]

MEMBERSHIP NONTRANSFERABLE

Membership in an unincorporated association is not transferable unless the constitution or by-laws provide that it shall be.[79] The interest of a member in such an association is not devisable or transmissible, and his estate receives nothing therefrom on his death[80] in the absence of a contractual or statutory provision to the contrary.

CONTROL OF AN UNINCORPORATED ASSOCIATION

In the absence of an agreement to the contrary, within the scope of the objects for which an association was formed, whether such objects are mentioned in the constitution or other paper defining the objects of the association or necessarily implied therefrom, a majority of the members possess authority to control the action of the association.[81] The majority controls only while it is doing those things for which the association was organized. If it is desired to have the association do something different from that for which it was formed, unanimous consent is necessary.[82]

NOTICE OF MEETINGS

If the constitution or by-laws provide how members shall be notified of meetings, they must be followed.[83] In general, all members are entitled to notice of all meetings and of the matters to be considered at such meetings. If matters of an unusual character are to be considered at a meeting, it is particularly important that the nature of the business be brought to the attention of each member.[84]

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[76] Hyde *v.* Wood, 94 U. S. 523.

[77] Richardson *v.* Francestown Union Cong. Soc., 58 N. H. 187.

[78] Cantril Telephone Co. *v.* Fisher, 157 Iowa 203, 138 N. W. 436.

[79] Moore *v.* Hillsdale County Telephone Co., 171 Mich. 388, 137 N. W. 241; McMahon *v.* Rauhr, 47 N. Y. 67.

[80] Sommers *v.* Reynolds, 103 Mich. 307, 61 N. W. 501; Mason *v.* Atlanta Fire Co., 70 Ga. 604, 48 Am. Rep. 585.

[81] 4 Cyc. 310; Goller *v.* Stubenhaus, 134 N. Y. S. 1043.

[82] Abels *v.* McKeen, 18 N. J. Eq. 462.

[83] Kuhl *v.* Meyer, 42 Mo. App. 474.

UNINCORPORATED ASSOCIATIONS AND THIRD PERSONS

The liability of the members of an association that is not engaged in business has been said to rest upon the principles of agency.[85] An illustration will make this more clear. In a Massachusetts case[86] the constitution stated that the association was formed to stimulate interest in the breeding of pigeons and bantams. It gave the board of directors charge of all public exhibitions of the society and required each member to pay an initiation fee and an annual assessment. An exhibition was held, and premiums were offered. The expenses thereof were greater than the receipts. Certain of the members paid the bills. They then brought suit against other members of the association to compel them to contribute their respective proportions of the loss sustained. The court said:

> Mere membership would not bind anybody for any further payment than the initiation fee and annual assessment; but such members as participated in a vote to incur further expenses for an exhibition with premiums, or as assented to be bound by such vote, would be bound thereby.

In other words, only those members were liable who authorized the exhibition with premiums or who later ratified the act of holding such an exhibition. The other members were not liable.

In a Michigan case[87] the members of a building committee of an unincorporated religious society ordered lumber of a dealer for the building of a church. A dispute arose, and the dealer brought suit against the members of the building committee, and won. In holding the defendants liable, the court said:

> The church organization had no legal existence. It could neither sue nor be sued. The members of the society were not partners. Those of the society who were actually instrumental in incurring the liabilities for it are liable as either principals or agents having no legal principal behind them. Members of the society who either authorized or ratified the transaction are liable, while those who did not are exempt from liability.

All the authorities apparently agree that if the debt or obligation in question was necessarily incurred for the express purpose for which the association was formed, each member thereof is liable. In a South Dakota[88] case the following language was used with reference to this matter:

> Each member of an unincorporated or voluntary association is liable for the debts thereof incurred during the period of membership and which had been necessarily contracted for the purpose of carrying out the objects for which the association was formed.

The question sometimes arises as to the liability of officers of an unincorporated association for debts contracted by them for the association. In the case of a business association the officers ordinarily are personally liable for its debts, but if they include a provision in the contract creating the obligation that they are not personally liable, then they are free from personal responsibility for the debt. The secretary of the North Dakota Farm Bureau Federation, an unincorporated organization, brought suit against the federation and its officers to recover for services rendered by him for the federation. It was held that if the officers of the federation stipulated that they were not to be bound individually that the officers were not individually liable upon the contract made with the secretary.[89]

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[84] State ex rel Rowland *v.* Seattle Baseball Ass'n, 61 Wash. 79, 111 P. 1055.

[85] 5 C. J. 1363.

[86] Ray *v.* Powers, 134 Mass. 22.

[87] Clark *v.* O'Rourke, 111 Mich. 108, 69 N. W. 147, 66 Am. St. Rep. 389.

[88] Lynn *v.* Commercial Club of Witten, 31 S. D. 401, 141 N. W. 471; see also Little Rock Furniture Mfg. Co. *v.* Kavanaugh, 111 Ark. 575, 164 S. W. 289; Schumacher *v.* Sumner Tel. Co., 161 Iowa 326, 142 N. W. 1034.

In an Arkansas case[90] it appeared that growers of sweet potatoes took steps with a view of forming an incorporated cooperative association for the purpose of curing and preserving potatoes. No corporation was formed, but persons selected as officers of the association by those interested in forming it executed two promissory notes in the name of the Ashdown Potato Curing Association, signing their own names as president and secretary, respectively. The money was used for building a potato-curing house. The venture failed. In connection with the project, subscription lists for stock were circulated. A suit was brought on the notes against the two officers of the association and about 60 other persons who were alleged to have been interested. The question for decision was who were liable on the notes. The Supreme Court of Arkansas in passing on this question said:

> It was a voluntary unincorporated association, in effect a partnership, and * * * the only question in the case was the identity of the persons who composed the association at the time the notes in the suit were executed.

This case illustrates how those interested in the formation of an incorporated association may, if the plans for incorporation fail, be held liable as members of an unincorporated association.

If an unincorporated association is engaged in business the members are liable as partners to third persons. This obligation is imposed by law on the members of such an association, and it is immaterial what the rules of the association provide on the subject of liability.[91] In a California case,[92] suit was brought by the plaintiff against an unincorporated cooperative association, and certain of its members, to recover the sale price of goods purchased by the association for use in its business. The association was composed of 19 members. The defendant recovered an individual judgment against two of the members of the association, and they appealed on the ground that they could not be held individually responsible for the claim of the plaintiff. In affirming the judgment of the lower court, the Court of Appeals of California said that the case came within the rule announced in volume 5 Corpus Juris, 1362, 1373, as follows:

> While as between the members of an unincorporated association, each is bound to pay only his numerical proportion of the indebtedness of the concern, yet against the creditors, each member is individually liable for the entire debt, provided, of course, the debt is of such a nature and has been so contracted as to be binding on the association as a whole * * *. An unincorporated association organized for business or profit is in legal effect a mere partnership so far as the liability of its members to third persons is concerned; and

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[89] Fuller *v.* Reed et al., 55 N. D. 707, 215 N. W. 147.
[90] Harris *v.* Ashdown Potato Curing Ass'n, 171 Ark. 399, 284 S. W. 755.
[91] Bennett *v.* Lathrop, 71 Conn. 313, 42 A. 634, 71 Am. St. Rep. 222.
[92] Webster *v.* San Joaquin Fruit and Veg. Growers' Protective Ass'n, 32 Cal. App. 264, 162 P. 654.

accordingly each member is individually liable as a partner for a debt contracted by the association.

It should be borne in mind that the association involved in this case was organized for business purposes. This case illustrates one of the serious objections to unincorporated associations and, in turn, emphasizes one of the great advantages of an incorporated association in which generally the members are not liable for the debts of the association.

MONEY MUST BE USED FOR PURPOSE SPECIFIED

In a New Jersey case [93] it was said:

> * * * The vote must be for some purpose for which the money was contributed. A majority can not devote the money of the minority, or even of a single member, to any other purpose without his consent.

The rule that money can be used only for the purpose for which contributed appears settled.[94] In the West Virginia case just cited, a retail butchers' protective association was organized with a constitution which specified the purposes for which money could be used. Through dues paid by the members a fund of $1,800 was accumulated. There were 24 members of the association. At a regular meeting 20 were present, and by a vote of 12 to 8 an order was passed to distribute all of the money in the treasury except $100 among the members. Certain of the members who opposed this use of the money obtained an injunction preventing the distribution of the money, and the supreme court of the State held that although a majority of the members present at the meeting had voted in favor of the distribution, yet it could not lawfully be diverted from the purpose for which contributed, as set forth in the constitution.

EXPULSION OF MEMBERS

It was pointed out earlier in this discussion on unincorporated associations that the rights of the members between themselves was a contractual one and that the constitution and by-laws, or either of them, constituted a contract between the members. It follows that if the constitution or by-laws assented to by the members state causes for expulsion from the association, ordinarily the courts would afford no relief if a member were expelled in good faith for such a cause.[95] This is undoubtedly the general rule.[96] However, all rules of the association relative to expulsion must be followed.[97]

The constitution or by-laws of the association may place the entire matter of disciplining, suspending, or expelling members in a committee or like body.[98] Such a provision in the constitution or by-laws, like other legal provisions in such instruments, is binding upon all members assenting to them.

It has been said with reference to unincorporated associations that "Courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the law of the land."[99] It is believed this states the general rule.

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[93] Abels *v.* McKeen, 18 N. J. Eq. 462.
[94] Kalbitzer *v.* Goodhue, 52 W. Va. 435, 44 S. E. 264.
[95] Connelly *v.* Masonic Mutual Benefit Ass'n, 58 Conn. 552, 20 A. 671, 9 L. R. A. 428.
[96] See case last cited and note in 9 L. R. A. 428.
[97] Farmer *v.* Board of Trade, 78 Mo. App. 565; Kelley *v.* Grand Circle Women of Woodcraft, 40 Wash. 691, 82 P. 1007.
[98] Harris *v.* Aiken, 76 Kan. 516, 82 P. 537.

WITHDRAWING OR EXPELLED MEMBERS RECEIVE NOTHING

In the absence of a contract or statute on the subject, the rule appears to be settled that those who withdraw[1] or are expelled[2] from an unincorporated association are not entitled to compensation for their interest in the association and that they thereby lose all rights in the property of the association.[3] Although a majority of the members of an association withdraw, the right of those who remain to continue the association appears clear, and this right carries with it the right to the property of the association.[4] In a Michigan case[5] it was said:

> It has been many times decided that persons who withdraw from a voluntary association are not entitled to any portion of its property, and that those who remain have the right to the property of the association and its use so long as any of the members remain, and clearly withdrawing members ought not to decide the right of those not withdrawing to continue the association.

DISSOLUTION

In the absence of a statutory or contractual provision to the contrary, an unincorporated association can be dissolved only by unanimous consent of the members.[6] Upon the dissolution of an unincorporated association, unless otherwise provided by its rules, its property after payments of its debts should be distributed pro rata among those who were members at the time of such dissolution.[7]

APPENDIX

THE BINGHAM CO-OPERATIVE MARKETING ACT

[Acts of Kentucky, 1922, chapter 1]

1. *Declaration of policy.*—(*a*) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through cooperation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this act is passed.

2. *Definitions.*—As used in this act,

(*a*) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee and any farm products.

(*b*) The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock.

(*c*) The term "association" means any corporation organized under this act; and

(*d*) The term "person" shall include individuals, firms, partnerships, corporations, and associations.

Associations organized hereunder shall be deemed "nonprofit," inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

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[99] Kelley *v.* Grand Circle Women of Woodcraft, 40 Wash. 691, 92 P. 1007.

[1] Richardson *v.* Harsha, 22 Okl. 405, 98 P. 897; see also Schwartz *v.* Duss, 187 U. S. 8.

[2] Missouri Bottlers' Ass'n *v.* Fennerty, 81 Mo. App. 525.

[3] Cases cited above.

[4] McFadden *v.* Murphy, 149 Mass. 341, 21 N. E. 868; Altmann *v.* Benz, 27 N. J. Eq. 331.

[5] Walters *v.* Pittsburgh & Lake Angeline Iron Co., 201 Mich. 379, 167 N. W. 834, 837.

[6] Sommers *v.* Reynolds, 103 Mich. 307, 61 N. W. 501; Parks *v.* Knickerbocker Trust Co., 122 N. Y. S. 521.

[7] Cases last cited.

(*e*) For the purposes of brevity and convenience this act may be indexed, referred to and cited as "The Bingham Cooperative Marketing Act."

3. *Who may organize.*—Twenty (20) or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a nonprofit, cooperative association, with or without capital stock, under the provisions of this act.

4. *Purposes.*—An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping, or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

5. *Preliminary investigation.*—Every group of persons contemplating the organization of an association under this act is urged to communicate with the Dean of the College of Agriculture of the University of Kentucky, who will inform them whatever a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Dean of the College of Agriculture of the University of Kentucky.

6. *Powers.*—Each association incorporated under this act shall have the following powers:

(*a*) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling, or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any nonmember, except for storage.

(*b*) To borrow money without limitation as to amount of corporate indebtedness or liability; and to make advances to members.

(*c*) To act as the agent or representative of any member or members in any of the above-mentioned activities.

(*d*) To purchase or otherwise acquire; and to hold, own, and exercise all rights of ownership in; and to sell transfer or pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing of any of the products handled by the association.

(*e*) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(*f*) To buy, hold, and exercise all privileges of ownership over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the association or incidental thereto.

(*g*) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged, and, in addition, any other rights, powers, and privilege granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this act; and to do any such thing anywhere.

7. *Members.*—(*a*) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, persons only engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises.

(*b*) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or manager or member thereof, duly authorized in writing.

(*c*) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

8. *Articles of incorporation.*—Each association formed under this act must prepare and file articles of incorporation, setting forth:

(*a*) The name of the association.

(*b*) The purposes for which it is formed.

(*c*) The place where its principal business will be transacted.

(*d*) The term for which it is to exist, not exceeding fifty (50) years.

(*e*) The number of directors thereof, which must be not less than five (5) and may be any number in excess thereof; the term of office of such directors; and the names and addresses of those who are to serve as incorporating directors for the first term, or until election and qualification of their successors.

(*f*) If organized without capital stock, whether the property rights and interests of each member shall be equal or unequal; and if unequal, the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision or paragraph of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or vote of three-fourths of the members.

(*g*) If organized with capital stock, the amount of such stock and the number of shares into which it is divided and the par value thereof.

The capital stock may be divided into preferred and common stock; if so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and definite extent of the preference and privileges granted to each.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this State; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State and other places, as prima facie evidence of the facts contained therein and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Dean of the College of Agriculture of the University of Kentucky.

9. *Amendments to articles of incorporation.*—The articles of incorporation may be altered or amended at any regular meeting or any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this State.

10. *By-laws.*—Each association incorporated under this act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws not inconsistent with the powers granted by this act. A majority vote of the members or stockholders or their written assent, is necessary to adopt such by-laws. Each association, under its by-laws, may provide for any or all of the following matters:

(*a*) The time, place, and manner of calling and conducting its meetings.

(*b*) The number of stockholders or members constituting a quorum.

(*c*) The right of members or stockholders to vote by proxy or by mail or both; and the conditions, manner, form, and effects of such votes.

(*d*) The number of directors constituting a quorum.

(*e*) The qualifications, compensation, and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof.

(*f*) Penalities for violations of the by-laws.

(*g*) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used.

(*h*) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association; the charge, if any, to be paid by each member or stockholder for services rendered by the association to him and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(*i*) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner, and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder or upon the expulsion of a member or forfeiture of his membership or, at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.

11. *General and special meetings—How called.*—In its by-laws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time; and 10 per cent of the members or stockholders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least 10 days prior to the meeting: *Provided, however,* That the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association.

12. *Directors—Election.*—The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such a case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may provide that primary elections shall be held in each district to elect the directors apportioned to such districts and that the result of all such primary elections may be ratified by the next regular meeting of the association or may be considered final as to the association.

The by-laws may provide that one or more directors may be appointed by any public official or commission or by the other directors selected by the members or their delegates. Such directors shall represent primarily the interest of the general public in such associations. The director or directors so appointed need not be members or stockholders of the association; but shall have the same powers and rights as other directors. Such directors shall not number more than one-fifth of the entire number of directors.

An association may provide a fair remuneration for the time actually spent by its officers and directors in its service and for the service of the members of its executive committee. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association or others, or differing from terms generally current in that district.

The by-laws may provide for an executive committee and may allot to such committee all the functions and powers of the board of directors, subject to the general direction and control of the board.

When a vacancy on the board of directors occurs other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by district. In such a case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy.

13. *Election of officers.*—The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and a treasurer, who need not be directors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer; or unite both functions and titles in one person. The treasurer may be a bank or any depositary, and as such, shall not be considered as an officer, but as a function, of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as and where authorized by the board of directors.

14. *Stock—Membership certificate—When issued—Voting—Liability—Limitations on transfer and ownership*.—When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stockholder of a cooperative association shall own more than one-twentieth (1/20) of the common stock of the association; and an association, in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth (1/20) of the common stock.

No member or stockholder shall be entitled to more than one vote, regardless of the number of shares of common stock owned by him.

Any association organized with stock under this act may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association; and such restrictions must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty (50) per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter.

15. *Removal of officer or director.*—Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by 5 per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association and, by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer, against whom such charges have been brought, shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by twenty (20) per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director; and by a vote of the majority of the members of that district the director in question shall be removed from office.

16. *Referendum.*—Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership or the stockholders for decision at the next special or regular meeting: *Provided, however,* That a special meeting may be called for the purpose.

17. *Marketing contract.*—The association and its members may make and execute marketing contracts, requiring the members to sell for any period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members, the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest on preferred stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding eight (8) per cent per annum upon common stock.

18. *Remedies for breach of contract.*—(*a*) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses, and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(*b*) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(c) In any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession or work on such land or the terms of whose tenancy or possession or labor thereon were created or changed after execution by the landowner or landlord or lessor, of such marketing agreement; and in such actions, the foregoing remedies for nondelivery or breach shall lie and be enforceable against such landowner, landlord or lessor.

19. *Purchasing business of other associations, persons, firms or corporations—Payment—Stock issued.*—Whenever an association, organized hereunder with preferred capital stock, shall purchase the stock or any property, or any interest in any property of any persons, firm or corporation or association, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest, shares of its preferred capital stock to an amount which at par value would equal the fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for the shares of stock issued.

20. *Annual reports.*—Each association formed under this act shall prepare and make out an annual report on forms to be furnished by the Dean of the College of Agriculture of the University of Kentucky, containing the name of the association; its principal place of business; and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of stockholders of a stock association or the number of members and amount of membership fees received, if a nonstock association; the total expenses of operations; the amount of its indebtedness or liabilities, and its balance sheets.

21. *Conflicting laws not to apply.*—Any provisions of law which are in conflict with this act shall not be construed as applying to the associations herein provided for.

Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association.

22. *Limitations of the use of term "cooperative."*—No person, firm, corporation, or association, hereafter organized or doing business in this State, shall be entitled to use the word "cooperative" as part of its corporate or other business name or title for producers' cooperative marketing activities, unless it has complied with the provisions of this act.

Any person, firm, corporation, or association now organized and existing, or doing a producers' cooperative marketing business in this State and embodying the word "cooperative" as part of its corporate or other business name or title, and which is not organized in compliance with the provisions of this act, must, within six months from the date at which this act goes into effect, eliminate the word "cooperative" from its said corporate or other business name or title.

23. *Interest in other corporations or associations.*—An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing, or selling of the agricultural products handled by the association, or the by-products thereof.

If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association against the commodities delivered by it, or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the usual and current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt delivered to the association on commodities of the association or its members, or delivered by the association or its members, shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association.

24. *Contracts and agreements with other associations.*—Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts, and arrangements with any other cooperative corporation, association or associations, formed in this or in any other State, for the cooperative and more economical carrying on of its business or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same personnel, methods, means, and agencies for carrying on and conducting their respective businesses.

25. *Associations heretofore organized may adopt the provisions of this act.*—Any corporation or association, organized under previously existing statutes, may, by a majority vote of its stockholders or members, be brought under the provisions of this act by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors to the effect that the corporation or association has, by a majority vote of its stockholders or members, decided to accept the benefits and be bound by the provisions of this act and has authorized all changes accordingly. Articles of incorporation shall be filed as required in section 8, except that they shall be signed by the members of the then board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation.

(*a*) Where any association may be incorporated under this act, all contracts heretofore made by or on behalf of same by the promoters thereof in anticipation of such association becoming incorporated under the laws of this State, whether such contracts be made by or in the name of some corporation organized elsewhere and when same would have been valid if entered into subsequent to the passage of this act, are hereby validated as if made after the passage of this act.

26. *Misdemeanor to induce breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof.*—

Any person or persons or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred dollars ($100) and not more than one thousand dollars ($1,000) for each such offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500) for each such offense.

27. *Warehousemen liable for damages for encouraging or permitting delivery of products in violation of marketing agreements.*—Any person, firm, or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500) for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violations of cooperative contracts.

28. *Associations are not in restraint of trade.*—Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations.

29. *Constitutionality.*—If any section of this act shall be declared unconstitutional for any reason the remainder of the act shall not be affected thereby.

30. *Application of general corporation laws.*—The provisions of the general corporation laws of this State and all powers and rights thereunder shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this act.

31. *Taxation.*—The shares of corporations organized under this act shall be taxable as against the owner thereof as of the period of assessment of other personal property for taxation in this State.

Such shares will represent in the aggregate all the property held or owned by such corporation, and when taxed as against the individual owner all of the property in the name of said association will thereby be taxed.

Under existing law crops grown in the year of assessment are exempt from tax whilst owned by the producer. So much of the value of each share of said stock as may represent the owner's proportion of crops grown by him and delivered to the association as herein provided, shall be exempt from taxation, inasmuch as it is the same thing exempted now by the constitution and laws of this State to such grower.

32. *Filing fees.*—For filing articles of incorporation an association organized hereunder shall pay ten dollars ($10); and for filing an amendment to the articles, two and fifty one-hundredths dollars ($2.50).

33. Whereas the agricultural interests of the State are of the utmost importance to the people of Kentucky; and

Whereas a demoralized condition of the farming interests of the State exists, injuriously affecting all other business; and

Whereas the highest interests of the State generally demand immediate relief; and

Whereas this act is designed and intended to afford such relief.

Therefore, an emergency is declared to exist and this act shall become effective immediately upon its passage and approval as required by law.

Delivered, received, and signed this January 10, 1922.

ORGANIZATION OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

October 28, 1929

Secretary of Agriculture	Arthur M. Hyde.
Assistant Secretary	R. W. Dunlap.
Director of Scientific Work	A. F. Woods.
Director of Regulatory Work	Walter G. Campbell.
Director of Extension Work	C. W. Warburton.
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